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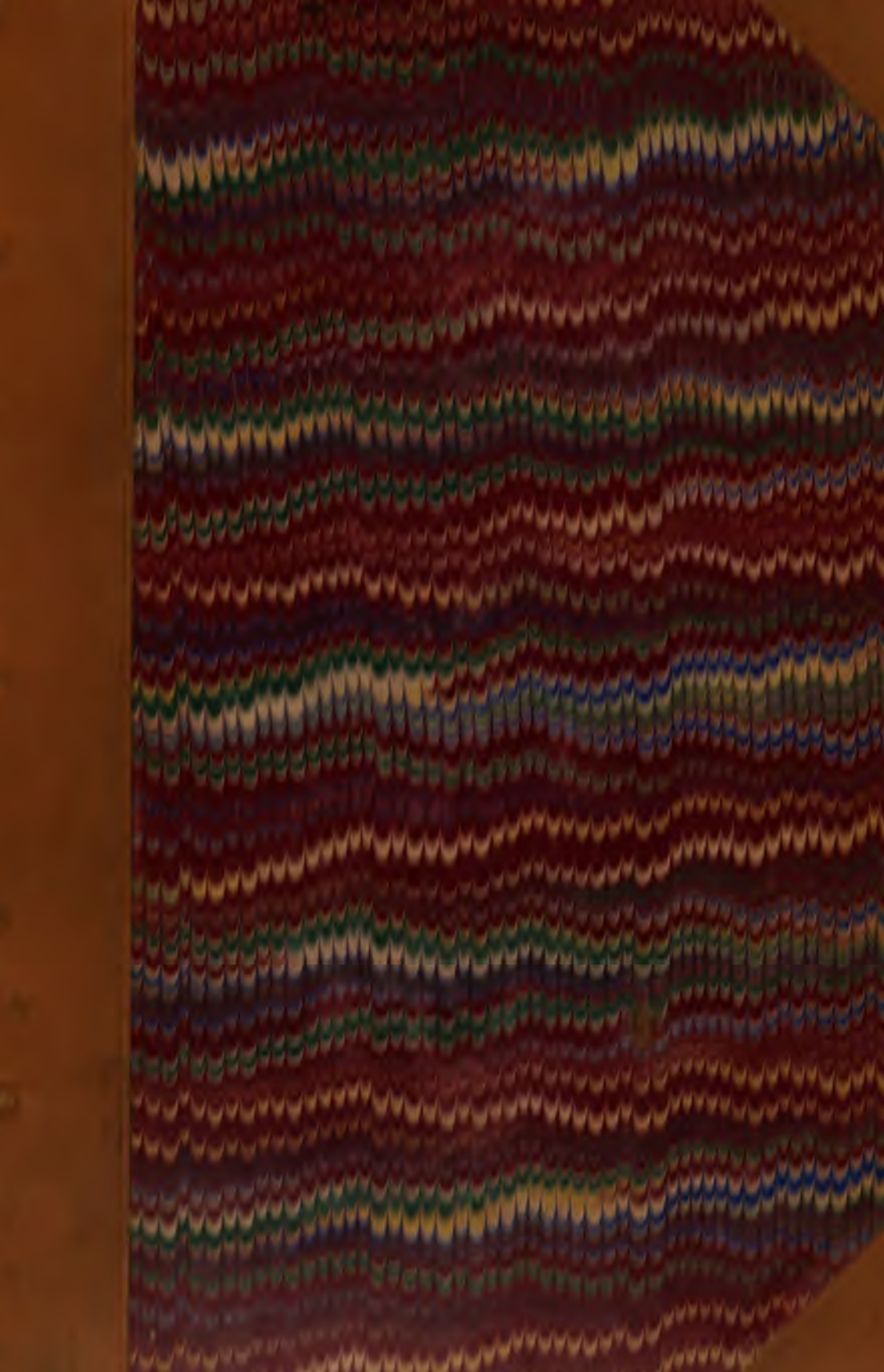

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THE

MONTREAL LAW REPORTS.

COURT OF QUEEN'S BENCH.

2801

JAMES KIRBY, Editor.

CASES DETERMINED IN THE
COURT OF QUEEN'S BENCH, MONTREAL,

1886,

(With some Cases of previous years.)

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(Reports distinguished by initials)

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VOL. II.

Montreal:
PRINTED AND PUBLISHED BY THE GAZETTE PRINTING CO.
1886.

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58,667

JUDGES

OF THE

COURT OF QUEEN'S BENCH

1886.

THE HON. SIR ANTOINE AIMÉ DORION, KT., *Chief Justice.*

" SAMUEL CORNWALLIS MONK,
" THOMAS KENNEDY RAMSAY,
" ULRIC JOSEPH TESSIER,
" ALEXANDER CROSS,
" LOUIS FRANÇOIS GEORGES BABY,

} *Puisne Judges.*

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Solicitor General:
THE HON. E. J. FLYNN, Q.C.

Clerk of Appeals:
L. W. MARCHAND.

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DECIDED IN THE

COURT OF QUEEN'S BENCH IN APPEAL,

MONTREAL.

January 25, 1886.

Coram DORION, C.J., RAMSAY, CROSS, BABY, JJ.

ALICE L. ROSS ET AL.
(*Respondents in the Court below*),
APPELLANTS;

AND

JESSIE ROSS ET VIR
(*Petitioners in the Court below*),
RESPONDENTS.

Appeal from order of judge in Chambers—C.C.P. 1340, 494.

HELD:—That an appeal does not lie directly to the Court of Queen's Bench sitting in appeal from the decision of a judge in Chambers revising an order of the prothonotary in a matter coming within the provisions contained in the third part of the Code of Procedure.

This was a motion to dismiss an appeal taken *de plano* from an order of a Judge of the Superior Court, setting aside an order of the Prothonotary, by which the appellants were authorized to borrow $5,000 on mortgage on immovable property belonging to the Ross estate.

Kerr, Q.C., for respondents, moving:—

The application for authorization was made by the appellants, in the first instance, to the Prothonotary, under art. 1256, Title 3rd of 3rd Part of the Code of

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Civil Procedure, as extended by art. 1339 of the same Code. The petition to revise the order of the prothonotary was presented to a judge of the Superior Court, sitting in Chambers, under art. 1339, and the decision, setting aside the said order of the prothonotary, was rendered by Mr. Justice Taschereau, as such judge sitting in Chambers. Art. 1340 C.C.P., provides for an inscription in Review from the order of a judge in such cases, in accordance with the provisions contained in articles 494 and following. Art. 494 treats of reviews, and sec. 5 says, "A review may be had upon every judgment or "order, rendered by a judge in summary matters, under "the provisions contained in the third part of this Code" (as in the present instance). This is specific, and agrees with art. 1340. Arts. 1115-16 treat of appeals. By art. 1115 appeals are permitted only from final judgments of the Superior Court, except in cases of *certiorari*, and in matters concerning municipal corporations or offices, as provided in art. 1033. Art. 1116 refers to interlocutory appeals. No mention is made in either of the articles of any right to appeal to the Court of Queen's Bench from an order of a judge, but as before noticed, special provision is made for the inscription in Review from such order when rendered in virtue of the 3rd Part 3rd Title of the Code of Procedure. In this case, the appellants in lieu of so inscribing in review instituted an appeal *de plano* to the Court of Queen's Bench. The law makes no provision for this, and the appeal should therefore be dismissed.

Pagnuelo, Q. C., for appellants :—

Art. 1261 C.C.P., allows concurrent jurisdiction to court and judge in matters such as the present, and wherever a court and judge have concurrent jurisdiction, an appeal lies from the order of the judge as well as the court. This principle was adopted by this court in *Clement & Francis*, (1) and *McCracken & Logue*. (2) Otherwise it would simply mean a multitude of appeals, as the appellants

(1) 5 Leg. News, 301. (2) 6 Leg. News, 326.

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would have been forced to inscribe in Review previous to being able to bring their case before this court.

DORION, C. J. :—

A point similar to the present was decided by this court in the case of *Béliveau & Chevrefils.* (1) Art. 1340 specifies the method to be adopted in the present case, and it is therein provided that the order of a judge in such matters may be inscribed in Review before three judges of the Superior Court. The law makes no provision for an appeal to this court directly in such cases, and the present appeal must consequently be dismissed.

The judgment is as follows :—

" The Court, etc., considering that under the provisions of Art. 1339 of the Code of Civil Procedure the Prothonotary of the Superior Court may exercise all the powers conferred upon the Court or a Judge thereof, but that any decision by such prothonotary is subject to be revised by a Judge upon application to that effect ;

" And considering that by Art. 1340 of said Code all decisions of the Court or Judge, are also subject to a review by three Judges of the Superior Court according to and in conformity with the provisions contained in Articles 494 and following of said Code ;

" And considering that there is no provision in the Code granting an appeal directly to this Court from the decision of a Judge in Chambers revising an order of the prothonotary in a matter coming within the provisions contained in the third part of the Code of Civil Procedure ;

" And considering that there is no right of appeal to this Court from the order given by the Honorable Mr. Justice Taschereau, on the 7th of November, 1885, appealed from ,

" This Court doth grant the said motion of the respondents and doth reject the said appeal of the appellants with costs."

Motion granted and appeal dismissed with costs.

Pagnuelo, Taillon & Gouin, attorneys for Appellants.

Kerr, Carter & Goldstein, attorneys for Respondents.

(J. K.)

(1) 1 Q. L. R. 209.

Nov. 25, 1885.

Coram DORION, C.J., MONK, CROSS, BABY, JJ.

CHARLES H. A. GRANT,
(*Tiers-saisi in Court below*),
APPELLANT;

AND

THE FEDERAL BANK OF CANADA,
(*Plaintiff in Court below*),
RESPONDENT.

Procedure—Declaration of Tiers Saisi—Contestation—C. C. P. 619.

HELD:—Where the garnishee has declared that he owes the defendant nothing, but in answer to questions put by the judgment creditor, under C. C. P. 619, has made admissions which apparently show that he has a sum in his hands belonging to the defendant, that the proper course is to contest the declaration, and not to inscribe for judgment *ex parte* on such statements.

The appellant had been condemned as garnishee to pay a sum of $1,590.29, money in his hands belonging to one Levetus, the defendant below. An attachment having been served upon appellant, he declared that he owed Levetus nothing. Subsequently questions were put to him, and it was elicited that the appellant had purchased the book debts of Levetus, and had collected the sum of $1,590.29 on account. The deed of sale under which he purchased the book debts was set aside at the suit of the Federal Bank. The Bank inscribed for judgment on the declaration of the garnishee, and the Court rendered the judgment now appealed from.

Geoffrion, Q.C., for the appellant, contended that no judgment could be rendered upon the declaration as it stood. The garnishee declared that he owed nothing. The bank should have filed a contestation of the declaration. As it was, the garnishee had been condemned without being heard.

Hutchinson, for the respondent, submitted that the sale of book debts to Grant having been set aside, they reverted to the estate of Levetus, and Grant, having admitted that he had collected $1,500 on account of those debts, occupied the position of a debtor to the estate of Levetus to the extent of the amount collected. The respondent, as a judgment creditor of Levetus, was entitled to judgment for the amount in question.

CROSS, J:—

The Federal Bank obtained a judgment against Henry G. Levetus for $1,439.40, besides interest and costs. To satisfy this judgment a *saisie-arrêt* was issued to attach in the hands of Charles H. A. Grant any money or value he might hold belonging to Levetus. Grant appeared and declared, in effect, that he owed Levetus nothing, and had nothing in his hands belonging to Levetus.

He was subsequently, in virtue of art. 619, C. C. P., interrogated at the instance of the Bank respecting certain transactions between him (Grant), said Levetus, and one A. A. Murphy, from which it would appear that Levetus, having become insolvent, made an assignment to Murphy for the benefit of his (Levetus') creditors, and Murphy had made a deed of sale to Grant of effects and credits of Levetus' estate, from which Grant admitted he had collected a considerable sum, viz., $1,590.29, and it appeared that the deed by which the transfer was made to him had been set aside in a suit brought against him and Murphy by the Federal Bank.

The Bank did not contest the declaration made by Grant, but treating the answers so procured from him as part of his declaration as *tiers saisi*, inscribed the case *ex parte*, and obtained judgment ordering Grant to pay the Bank $1,590.29 with costs, within fifteen days after the service upon him of the judgment.

Grant has appealed from this judgment, and contends that the Bank had no right in this manner to take an *ex parte* judgment against him in the face of his declaration that he owed Levetus nothing and had nothing in his

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Grant & Federal Bank.

hands belonging to him; that although he had made certain affirmative answers to the questions put to him it did not follow but that these could be all explained in a manner consistent with his declaration, which, if the bank contested, he, Grant, was ready to reply to by a sufficient answer and had a right to make that answer and adduce proof on it, and the trial of such contestation would determine whether or not his answer would be sustained. In the meantime his answer must stand according to the position taken by him.

It is quite obvious that this *ex parte* judgment is wrong. Grant took the position that he owed nothing to Levetus and had nothing in his hands belonging to him, Levetus, and until the question is tried on a contestation of his declaration he has a right to hold to his declaration, and the Federal Bank cannot controvert it without a contestation in order to apply the proof obtained from Grant by his examination and the adduction of such other proof as they see fit to make. Grant also is entitled to make his answer and his proof, whereupon the question of his liability would be determined.

For these reasons we are of opinion that the judgment of the court below should be set aside, and the parties placed in the position they were before the inscription for judgment *ex parte* at the instance of the Federal Bank upon Grant's declaration as *tiers saisi*, and it is ordered accordingly.

The judgment is as follows:—

"Considering that the Federal Bank, respondent in this cause, had no right to obtain a judgment *ex parte* against the appellant Charles H. A. Grant, *tiers saisi*, on the attachment made herein while the declaration of the said *tiers saisi* remained uncontested, the same being to the effect that he owed nothing and had nothing in his hands belonging or due to the defendant Levetus, and considering that in the event of such contestation the appellant would have had the right to explain the answers which he gave to the interrogatories put to him in virtue of Art. 619 C. C. P., and to show (if such were the fact) that he owed

nothing and had nothing in his hands belonging or due to the defendant Levetus, and to do so as well in answer to any affirmative proof that might have been made against him as in explanation of his said answers, and on such contestation would have had the right to support his pretensions by allegations and proof, in like manner as the respondent would have had the right to maintain the contrary, and to show, as well by the affirmative answers as by other evidence, that the *tiers saisi* owed or had value in his hands belonging or due to the defendant Levetus, and that without an issue raised by such contestation a judgment could not under the circumstances of the present case lawfully pass against the appellant as such garnishee, condemning him as has been done in the present case;

" Considering, therefore, that there is error in the said judgment, to wit, the judgment rendered by the Superior Court at Montreal on the 2nd of July, 1884, from which the present appeal has been taken, the Court of Our Lady the Queen now here doth cancel, annul and set aside the said judgment and all the proceedings had in the said cause at the instance of the respondent against the appellant on the attachment made in the said cause, commencing with 13th March, 1884, and this Court doth condemn the respondents to pay the costs of the present appeal."

Judgment reversed.

Geoffrion, Rinfret & Dorion, attorneys for appellant.

Macmaster, Hutchinson & Weir, attorneys for respondent.

(J. K.)

September 25, 1885.

Coram DORION, C.J., MONK, RAMSAY, TESSIER, BABY, JJ.

HON. ALEXANDER CROSS,
(*Plaintiff in Court below*),
APPELLANT;

AND

THE WINDSOR HOTEL CO. OF MONTREAL,
(*Defendant in Court below*),
RESPONDENT.

City of Montreal—Assessment for improvement—42 & 43 Vic. ch. 53, s. 4, §§ 1, 4—Warranty—Construction of agreement as to waiver of interest.

A vendor who sells a property during the proceedings of expropriation for a public improvement is not *garant* of the purchaser for the share of the cost of the improvement with which the property is charged by an assessment roll subsequent to the date of the sale. And this holds good even where the assessment roll referred to was prepared under the authority of an Act of the Legislature to take the place of the original assessment roll for the same improvement, made *previous* to the sale, but which had been declared null by the Courts,—there being nothing in the Act to give a retroactive effect to the new assessment roll, or to reserve to the actual owner of a property any recourse against those from whom he had derived his title after the improvement had been made.

2. The vendors, by a clause of the deed of sale, relinquished and waived any right to exact interest on the unpaid balance until the net revenues of the company purchaser should be sufficient to pay the annual liabilities of the company for interest, insurance, etc., in connection with a certain loan, after which they would be entitled to receive interest to the extent of 7 p. c. out of the surplus of revenue, according to its sufficiency:—*held*, that the true meaning of this stipulation was that the purchaser should pay no interest on the balance due during the extension of time granted for the payment of the balance, unless the net revenue of the property should be sufficient to pay the charges for interest, insurance, etc., and not merely that the claim for interest should be postponed.

The appeal was from a judgment of the Superior Court, Montreal (DOHERTY, J.), June 9, 1884, maintaining a plea of compensation and dismissing the appellant's action.

Geoffrion, Q.C., for the appellant.

H. Abbott, for the respondent.

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RAMSAY, J.:—

This is a suit by a *cessionnaire* to recover part of a *bailleur de fonds* claim and interest. The action is met by the respondent setting off an amount paid by the company in discharge of the *auteurs* of appellant for alleged improvements, by which the property sold to respondent was said to be benefitted. The respondent also contends that by an agreement with the *auteurs* of appellant in 1878, they relinquished the interest on the balance of the claim due by the company to appellant's *auteurs* from that time, until the hotel company was in a position to pay certain expenses, and seven *per centum* on a sum of money borrowed by the hotel company, and out of which appellant's *auteurs* were to be paid, and were paid a large portion of their claim.

The first question that arises on the issues thus raised is, whether a vendor who sells during the proceedings of expropriation for a public improvement, is *garant* of the purchaser for the share of the improvement with which the property is charged by a subsequent repartition. We are of opinion that under our law this question offers no difficulty. Although no statute, such as those in force here with regard to distributing the cost of improvements on the property of spècial individuals, existed in France, the general principle which must govern this question is given precisely by Pothier. He says: "Le vendeur est tenu des évictions dont il avait une cause, ou du moins un germe existant dès le temps du contrat de vente, soit qu'elles procèdent, soit qu'elles ne procèdent pas du fait du vendeur." Vente No. 86.

The next question is what constitutes a *germe existant* at the time of the sale? It has been suggested by appellant that he was a *cessionnaire*, and that the company had accepted the allegation of the debt, and had promised to pay appellant, and that it does not appear that his vendors were the owners of the land at the time of the improvements. On these points we are against appellant. It is abundantly evident that he was the *cessionnaire* of the vendors in possession when the proceedings with regard to the improvement began, and the hotel company ac-

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cepted signification of the deed of cession and no more; we, therefore, think appellant stands precisely in the position of the original vendors. The real difficulty arises out of an *ex post facto* law. It is a difficulty which, one would suppose, should at once have suggested itself to the mind, as not the least obvious of the many inconveniences resulting from *ex post facto* legislation of this kind, that it would disturb most unfairly acquired rights. The proceedings with regard to the expropriation, were, at the time of the sale, so illegal that it was necessary to apply to the Legislature to renew the power to make a repartition of the cost of the improvement. This law does not say who shall pay for the improvement, and in the absence of such a disposition, it is impossible to charge the vendor, under the ordinary charge of warranty, with a liability, which had no legal existence at the time of the sale. We must, therefore, reverse the judgment, in so far as regards the capital.

On the question of interest we are with the company respondent. By the terms of the deed the *auteurs* of appellant relinquish their claim to interest, and it is impossible to read the clause to mean that the intention was only to give the company delay to pay the interest till, by their operations, they were able to pay seven *per centum*. When the parties intended only to extend the delay of payment they used expressions which plainly indicate that intention. The judgment will, therefore, be reformed with costs of both Courts.

DORION, C. J.:—

By this action, the appellant seeks to recover from the Company (respondent) $2,231.37, of which $1,290.63 is for a balance of a larger sum which, by deed executed before Hunter, Notary Public, on the 28th June 1877, the Company acknowledged to owe to Mary Ann Campbell, widow Elisha Lane, and which balance she has transferred to the appellant by deed of the 15th of June, 1880, and the remainder for interest at 7 p.c. on said balance from the 1st of July, 1877, to the 15th December, 1883, date of the action.

To this demand, the Company has pleaded, in substance, that they had paid eighty-seven and a half per cent. of the debt mentioned in the deed of the 27th of June, 1877, leaving the balance in principal now claimed by the appellant; that according to the agreement entered into by that deed, the interest on the balance due was only to be paid from the first of July, 1881, when the net revenue of the property of the Company became sufficient to pay the annual liability for interest, insurance and other charges in connection with a contemplated loan of $350,000; that this debt had been incurred by the Company for the price of the Windsor Hotel property, and that both principal and interest were paid and compensated by a larger sum which the Company had paid to the City of Montreal for taxes due on the property by the *auteurs* of the appellant who sold the property to the Company.

The Court below maintained the plea of compensation and dismissed the appellant's action.

The facts which gave rise to the litigation between the parties are as follows:—

On the 3rd of April, 1875, David Torrance, Mary Lunn, Julia Lunn, Emma H. Lunn and Alexander H. Lunn, sold to the Company (respondent) the property on which the Windsor Hotel has since been built in the City of Montreal, for the sum of $112,212, whereof $18,702 were paid, leaving a balance of $93,510 remaining unpaid.

Alexander H. Lunn, one of the vendors, seems to have transferred to Mrs. Lane, on the 7th June, 1876, his share of the purchase money, and by deed of the 28th of June, 1877, the Company agreed to pay Mrs. Lane, representing one of the vendors, and to the other vendors $86,034.46, being 87½ per cent. of their claim in principal and interest, which sum has since been paid. Mrs. Lane and the vendors David Torrance and others, excepting Alexander H. Lunn, who was not a party to the deed, agreed to assist the Company in obtaining a loan of $350,000, and to relinquish the priority of their hypothecs upon the property, and also to extend to six years the period for the payment of the balance due them, "*they relinquishing and waiving*

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any right to exact and require any interest upon the amount of said balance until the net revenues of the Company should be sufficient to pay the annual liabilities of the Company for interest, insurance, &c., in connection with the said loan of $350,000, *after which they would be entitled to receive interest to the extent of* 7 *p c. out of the surplus of revenue, according to its sufficiency.*"

The secretary of the Company has testified that it was only since July, 1881, that the Company had a net surplus available to pay interest on the claim of the appellant.

Previous to the sale of the property to the Company, certain public improvements had been made in the vicinity, by the opening of Stanley Street and of Dominion Square, and the property had been assessed for a share of the cost of these improvements. The claim of the city was, however, disputed, and by the deed of sale of 3rd of April, 1875, the vendors reserved all right of action, claims and demands they might have against the Mayor, Aldermen and citizens of Montreal, for the recovery of the special assessment for the opening of Stanley Street, and for the drain in said street, paid by the vendors to the Corporation.

By two judgments rendered in 1876 and 1879, the assessment rolls by which the property sold to the Company had been charged with a proportion of the cost for opening and widening Stanley Street, and for opening Dominion Square, were set aside.

Subsequently, the city obtained from the Provincial Legislature authority to cause other assessment rolls to be made for the purpose of assessing in whole or in part the cost of the improvements already made *upon all and every the pieces or parcels of land or real estate which the commissioners* (to be named) *should determine to have been benefitted.* (Act of 1879, 42 & 43 Vict. c. 53, sec. 4, §§ 1 & 4.)

New assessment rolls were made under this Act, and the commissioners having determined that the property of the Company (respondent) was benefitted by the improvements referred to, assessed the amount to be paid by the Company at the sum of $522.90 for the opening and

widening of Stanley Street, and at the sum of $1,350 for the opening of Dominion Square.

These two sums with interest amounting in all to $1,901.70 were paid in 1882, by the Company, who was sobrogated to the rights of the city, and now claims that this liability was an unliquidated charge upon the property at the time of the sale of the property, and that the sums so paid with interest accrued since the payment is to be set off against the claim of the appellant as representing Alexander H. Lunn, one of the vendors of the property.

The questions arising under these facts and the issues raised between the parties are:—

1st. Is the appellant entitled to claim the payment of interest from the 1st of July, 1877, or merely from the 1st of July, 1881, when the Company had a net surplus after paying interest and insurance in connection with the loan of $350,000?

2nd. Is the Company (respondent) entitled to oppose to the appellant that his claim is compensated and extinguished by the sums the Company has paid to the city?

On the first question, the appellant contends that the stipulation as regards interest in the deed of the 28th of June, 1877, does not amount to an abandonment of any claim for interest until the revenues of the Company were sufficient to pay interest, but to a mere postponement of the term of payment of these interests, which were to run in the meantime as if no agreement had taken place.

We do not think this is the interpretation which ought to be given to the stipulation contained in the deed of the 28th of June, 1877. By that deed, Mrs. Lane and the other creditors agreed to extend, for a period of six years, the term of payment of the balance of the principal, and to waive their right to claim interest until the net revenues of the Company should be sufficient to pay the interest and insurance connected with the contemplated loan of $350,000. In the case of the principal, they have extended the delay for its payment, in the case of the interest, they have waived the right to claim it. If the intention had

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been merely to postpone the payment of the interest, the parties would have made use of the same expressions as they applied to the payment of the principal instead of waiving the right to claim it. By the agreement, the Company is only to pay interest to the extent of seven per cent. per annum, from the time the net revenues of the Company are sufficient to pay the charges connected with the loan, which necessarily implies that no interest would accrue in the meantime.

On the second question we are with the appellant.

The effect of the two judgments of 1876 and 1879, setting aside the original assessment rolls, was to free the property sold to the Company from any charge or liability for the cost of the improvements in opening Stanley Street and Dominion Square, and until the passing of the Act of 1879, the city had no power to enforce the payment of any portion of the cost of these improvements, which, but for this Act, would have remained a charge upon the general revenue of the city. The Commissioners appointed under the Act of 1879, were authorized to determine what were the properties to be benefited by the improvement, and which were especially assessed for it. (Sect. 4, §2, referring to §8 of 37 Vict. ch. 51, sect. 176). This they have done by determining that the Company, respondent, was interested in the improvement, and by assessing its property for its proportion of its cost. There is nothing in the proceedings of the Commissioners to affect the former owners of the property, and nothing in the law to give a retroactive effect to their awards and assessment rolls; nor to reserve to the actual owners of the property any recourse against those from whom they had derived their title after the improvements had been made.

The *auteurs* of the Company were not parties to the proceedings of the Commissioners, and could not urge any objection either to the regularity of their proceedings, or to the amount awarded. The city could not, under these assessment rolls, have collected from the *auteurs* of the Company, the amount for which the property of the Company was assessed, since the Company was alone men-

tioned in these assessment rolls. The Company so understood it, by acquiescing in the proceedings of the Commissioners, and by paying the amount of the assessment; —the money was paid to discharge a liability of the city, and not a liability of the *auteurs* of the Company, which has therefore no recourse against them, there being no special warranty in the deed of sale providing for such a contingency. (Troplong de la vente, No. 465–6 & 7).

But supposing the vendors to have been, under the general warranty stipulated in the deed of sale, liable to reimburse the sums paid by the Company on the Assessment Rolls made under the Act of 1879, the appellant is not one of the vendors, nor bound to the warranty stipulated in the deed of sale. He does not sue on this deed of sale, but upon the deed of the 28th of June, 1877, by which the Company promised to pay to Mrs. Lane, whom he represents, the sum which he claims, this promise having been made by the Company after full knowledge of the existing circumstances, and after one of the original assessment rolls had been set aside.

Mrs. Lane is therefore protected from any claim on the part of the Company, respondent, by the provisions contained in Arts. 1180 and 1192 of the Civil Code, and the Company can no more retain the balance still due on her claim than it could force her to refund the eighty-seven and a half per cent. of her original claim which the Company has paid to her after the passing of the deed of the 28th of June, 1877.

The appellant is, if possible, in a still better position than his *auteur*, Mrs. Lane, since the Company, through P. S. Ross, its Secretary, has offered to pay him the balance coming to him, and this long after the Company had paid to the City the amount for which its property had been assessed under the new assessment rolls. This offer was made without any reference to or reserve of any claim whatsoever, as will be seen by the letter of the 7th of June, 1883, forming part of the record.

If it could be held that Mrs. Lane and the appellant, as representing Alexander H. Lunn, are the *garants* of the

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Company, (respondent), the guarantee could not extend beyond that of their *auteur*, who only sold to the Company one-eighth share of the property, and would only be bound to indemnify the Company for one-eighth of the assessments claimed to have been paid for and to be due by the vendors; there being no stipulation of joint and several warranty on the part of the vendors, the obligation to reimburse would clearly be divisible. Troplong de la vente, after discussing this question of divisibility, says, No. 240, "Ce point n'est contesté par personne."

As we are of opinion that the appellant is not *garant* and owes no indemnity to the Company for any portion of what the Company has paid to the city, it is unnecessary to determine what would be the extent of his liability if he were his *garant*.

The judgment of the Court below is therefore reversed and the action of the appellant maintained for the sum of $1,290.63, with interest from the 1st of July, 1881, and the claim for previous interest rejected.

MONK, J.:—

I agree with my colleagues on the main questions. There were two assessments, one before the sale by David Torrance and others, which there was no law to support, and there was a clause in the deed giving to the vendors the advantages derivable from the nullity of that taxation.

The property therefore passed to the purchasers with at least the risk of the future action of the legislature who had the power, but were not supposed to be likely to invade private rights by imposing taxes previously declared illegal and on property legally free from any such burdens; but if the law to authorize such a tax was allowed to pass unchallenged it was at the risk of the party in possession, who should have opposed it, and thus protected their property.

The second assessment was imposed to recoup the Corporation for their outlay, they did not require to be particular as to who were to be the sufferers, provided they got sufficient power to levy their indemnity.

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It was consequently imposed not on the appellant nor on Torrance and others, but upon the Windsor Hotel Company, who allowed it to pass without notice to or any call upon Torrance and others or the appellant. It was made long after the sale by David Torrance and others. They had accepted a new creditor with whom they had made new and different terms, and their old creditors, David Torrance and others, had disappeared from the scene. But if they still could have had recourse against any one for this newly imposed tax it would certainly not have been against the appellant, but against David Torrance and others, between whom and them only were conventions for a warranty.

Besides this, the respondents have placed themselves in an awkward position by not replying to appellant's special answer, which certainly contains allegations sufficient to prove his case, and which should be taken as admitted.

I now come to the question of interest, respecting which I cannot agree with the views of my learned brethren. The respondent claims that interest should only be computed at seven per centum per annum from the 1st July, 1881, and they raise this pretension under a clause in the composition deed of the 28th June, 1877, which reads as follows:—"The parties of the first and second parts here- "by respectively relinquish and waive any right to exact "or require any interest upon the amount of said balance "until the net revenues of the property of the said Com- "pany shall be sufficient to pay the annual liability of "the said Company for interest, insurance, &c..... "After which the said parties of the first and second parts "shall be entitled to receive interest to the extent of seven "per centum per annum out of such overplus of revenue "according to its sufficiency." This clause contains no release of interest, it only waives the right to exact interest until a fund accumulates sufficient to liquidate the interest out of which the arrears as well as the current interest should be paid.

No one is presumed to relinquish his right without a

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distinct declaration to that effect, which is certainly not to be found in the clause in question. But suppose for the sake of argument that the clause imported a release, it was conditional on the terms of the compromise being conformed to, which would have required the debtor to be ready with and to tender the money when it fell due, or the debt revived in full.

Again, in such case, it was for the debtor, the Company, to show the state of their accounts, if they desired to have the benefit of such a condition. They have failed to make any sufficient proof. It was concerning a fact exclusively within their cognizance. They were paying dividends in 1882, which implied ability to pay interest at an earlier date.

The respondents have made no proof whatever of deficiency of funds. They gave no satisfaction, and merely fix the arbitrary date of 1st July, 1881.

Mr. Ross, on his examination for the appellant, makes a passing allusion to being behind on that loan to the extent of $45,000, but they paid it off by a new arrangement; this must have referred to the sale or negociation of their bonds. It is at all events inapplicable to the interest on the debt in contemplation by the agreement of 28th June, 1877. He says, I rendered an account showing the financial position of the Company itself. I never rendered any statement to the plaintiffs.

When on the 7th June, 1883, Ross wrote to the appellant, "a considerable time ago I informed you we could "not pay interest thereafter," what interest did he refer to? No deduction had up to that time been claimed,—no account furnished, nor any notice of a fixed time from which only the Company pretended interest was payable.

The six years' delay had not then expired, and without explanation as the case then stood, it must have meant the whole interest. They must have construed the deed as the appellant did. The conditions were giving time for the capital, but naturally a creditor would expect interest as soon as the funds were sufficient. The respondents made a point that some of the creditors accepted

the respondent's terms. This is obviously no argument. The appellant is entitled to interest from 1st July, 1877, according to the deed of agreement of the 26th June, 1877.

The following is the judgment of the Court:—

"The Court, etc....

"Considering that the appellant claims by his action the payment of $2,231.37, to wit: 1st, 1,536.33 for the undivided eighth share of the sum of $12,290 which appears to have been the balance due on the price of sale by David Torrance and others to the Company respondent by deed of sale before J. S. Hunter, notary, bearing date the 3rd of April, 1875, which sum of $1,536.33 was by deed of transfer bearing date the 7th of June, 1876, before J. C. Griffin, notary, transferred by Alexander H. Lunn to Mary Ann Campbell, widow of Elisha Lane, and by the said Mary Ann Campbell to the appellant by deed passed before J. S. Hunter on the 16th of June, 1882; which sum the said Company respondent promised to pay to the said Mary Ann Campbell by a certain agreement passed before J. S. Hunter, notary, on the 28th June, 1877; 2nd, the sum of $695.04 for interest on the said sum of $1,536.33 from the 1st of July, 1877, to the 17th of December, 1883, at the rate of 7 per centum per annum, with interest on the whole amount of $2,231.37 from the said 17th of December, 1883, date of service of the action;

"And considering that the respondents have pleaded to this action, 1st, that according to the said deed of agreement they were only bound to pay interest from the 1st of July, 1881, when the revenue of the Company had become sufficient to pay insurance charges and interest on the loan mentioned in said agreement; 2nd, that the amount due by the Company, to wit, the said sum of $1,536:33, with the sum of $101.65 for interest due on the said principal from the 1st of July, 1881, to the 10th June, 1882, forming together the sum of $1,637.98, was compensated by the sums of $522 and $1,882, forming together the sum of $2,404, which the said respondent had paid to the Corporation of the City of Montreal for assessments

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on the property which they had purchased from the said David Torrance and others, to defray the cost of improvements made in Stanley Street and Dominion Square of the City of Montreal before their said purchase, and for which the said appellant, as representing one of the original vendors, was bound to indemnify them;

"And considering that it appears, by the said deed of agreement, of the 28th of June, 1877, that the said Mary Ann Campbell, the *auteur* of the appellants, for the considerations therein mentioned, has consented to relinquish and waive any right to exact or require interest upon the balance coming to her until the net revenue of the property of the Company respondent should be sufficient to pay the annual liability of the said company for interest, insurance, etc., in connection with the loan of $350,000 mentioned in said deed, after which she would be entitled to receive interest to the extent of seven per cent. per annum out of such surplus of revenue according to its sufficiency;

"And considering that the true meaning of the said stipulation is that the said Company respondent should pay no interest on the balance due to the said Mary Ann Campbell during the extension of time granted for the payment of said balance unless the net revenue of their property should be sufficient to pay the charges for interest and insurance in connection with the said loan of $350,000;

"And considering that it does not appear by the evidence that at any time before the 1st of July, 1881, the net revenues of the said property exceeded the charges to be paid out of said revenue in preference to the claim of the said Mary Ann Campbell, the appellant as representing the said Mary Ann Campbell is only entitled to interest at the rate of seven per centum on his said claim from the 1st of July, 1881;

"And considering that the sums of $522, and $1,882, paid by the said respondents, were so paid for assessments imposed on the immoveable property which the said respondents have purchased from the said David Torrance and others, under and by virtue of an Act of the Provin-

cial Legislature passed since the said respondents have purchased the said property;

" And considering moreover that the said appellant nor the said Mary Ann Campbell are the *garants* of the said Company respondent, and that the said appellant claims as the *cessionnaire* of the said Mary Ann Campbell the payment of a sum of money which the said Company have formally promised to pay to her by the deed of agreement of the 28th of June, 1877, which payment the appellant is by law entitled to demand notwithstanding any claim the said Company might have against their vendors under the warranty stipulated in their deed of purchase;

" And considering that in the judgment appealed from, to wit, the judgment rendered by the Superior Court sitting at Montreal on the 9th day of June, 1884, there is error, and that the appellant is entitled, as the *cessionnaire* of the said Mary Ann Campbell, to recover from the Company respondent the said principal sum of $1,536.33 together with the sum of $264.88, interest thereon, etc.;

" This Court doth reverse, annul and set aside the said judgment of the 9th June 1884, etc., doth condemn the said respondent to pay to the appellants the said sum of $1,801.21, with interest, etc."

Judgment reversed. (1)

Davidson, Cross & Cross, attorneys for Appellant.

Abbott, Tait & Abbotts, attorneys for Respondent.

(J. K.)

(1) The decision in the above case supports the judgment of Taschereau, J., in *Lunn* v. *Windsor Hotel Co.*, M. L. R., 1 S. C. 137.

January 25, 1886.

Coram DORION, C.J., RAMSAY, TESSIER, CROSS, BABY, JJ.

THE CITIZENS INSURANCE CO. OF CANADA
(*Defendants in Court below*),
APPELLANTS;

AND

ISAAC BOURGUIGNON
(*Plaintiff in Court below*),
RESPONDENT.

Fire Insurance—Powers of Agent—Interim Receipt—Non-issue of Policy—Conditions—Notice of other Insurance.

HELD:—That the agent of an insurance company has no authority to accept an insurance and give a receipt for the premium in exchange for a receipt for his individual debt to the person insuring, and such act on his part will not bind the company.

The appeal was from a judgment of the Superior Court, Montreal, RAINVILLE, J., 31st January, 1882, condemning the appellants to pay the respondent the sum of $935, amount of loss by fire sustained by respondent.

M. M. Tait, Q.C., for the appellants.

J. C. Hatton, Q.C., and *H. J. Kavanagh*, for the respondent.

The judgment of the Court was delivered as follows:—

RAMSAY, J.:—

This is an action on an insurance receipt given by the company's agents at St. Johns.

It is contended that there was no insurance because the premium had never been paid, but that the agents of the company took the insurance, so far as they could, by setting off the amount of the premium against their account with respondent. Secondly, that by terms of the receipt, a policy was to be given within thirty days by which the receipt was to become void, and no policy had been issued. Thirdly, that by the receipt, the insurance was made subject to the conditions of the policy, one of

which was the giving notice to the company of any other insurance, to be endorsed on the policy, or otherwise acknowledged in writing.

The first point is very important. We think it can hardly be questioned that an agent of an insurance company cannot take insurances and grant receipts in exchange for a receipt for his individual debt. And it appears that this is equally true whether the agent be one having general or limited powers, unless the power be specially conceded to him to perform such a transaction; and so we held in the case of the *Ottawa Insurance Co. & Bouthillier.* (1) But the respondent says that this is not exactly the question, for that the company owed him more than the amount of the premium. This might materially alter the question, if it appeared that the company had got a perfect equivalent for the amount of the premium. And so we held that where a general agent, who had an office in Montreal for the transaction of the business of the company, ordered books for the company insuring, and for the price of which the company was liable, he might fairly set off the account due by the company against a premium. But in this case no such transaction took place; the liability of the company for the account is not proved; the account is not produced; the respondent had only a common account with the agents, and it does not appear that they went through the form of exchanging a receipt which would bind the respondent. We think, therefore, on this ground, the judgment should be reversed.

On the second point we are against the appellants. There is an "N.B." to the policy which appears to be conclusive that the receipt was not to be void till notice received and balance of premium repaid. Besides, we have already held that the receipt binds till the actual reception of the notice of cancellation. (2)

On the third point we are also against the appellants. The appellants were to give a policy, if the receipt is

(1) 2 Leg. News, 394.

(2) Tough et al. & The Provincial Insurance Co., 20 L. C. J. 168.

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valid; they did not give it, but wish to bind the respondent by conditions he could alone know by the policy. This is a one-sided way of dealing with a contract, and we have already held that this could not be; *Lafleur & The Citizens Insurance Co.*(1) Besides, how could it be endorsed on a policy which did not exist?

The judgment follows:—

"Considering that it appears by the evidence in this cause that the respondent never paid the amount of premium mentioned in the interim receipt on which the present action is founded;

"And considering that Roy, the agent who signed the said interim receipt, had no authority to sign and issue the same without receiving the amount of premium required to effect the insurance therein mentioned;

"And considering that it is not proved that the said company appellant ever accepted the said risk, or acquiesced in the issue of the said insurance, or ratified the act of the said Roy;

"And considering that there is error, etc., doth reverse, etc., and dismiss the action of the respondent with costs."

Judgment reversed.

Abbott, Tait, & Abbotts, attorneys for Appellants.

J. C. Hatton, Q. C. attorney for Respondent.

(J. K.)

(1) 1 Leg. News, 518; 22 L. C. J. 247.

January 16, 1886.

Coram DORION, C.J., RAMSAY, CROSS, BABY, JJ.

AGNES ROBINSON,

(*Plaintiff in Court below*),

APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY

(*Defendant in Court below*),

RESPONDENT.

Master and Servant—Damages—New Trial—Exclusion of Testimony—Partiality of Jury.

HELD:—1. An employer is responsible for the damages suffered by an employee through the negligence or want of skill of a fellow employee.

2. (Following *Ravary & G. T. R.*, 6 L. C. J. 49,) A direction to the jury that anguish of mind suffered for the loss of a husband may properly be taken into consideration by them in estimating the damages which should be allowed to the widow, is not erroneous.

3. Where a witness arrived after the evidence at the trial was closed, but before the jury were charged, the exclusion of his testimony was not in itself a sufficient ground for allowing a new trial; but the Court will look to the relevancy and importance of the evidence which the witness was prepared to give, and where the affidavit of such witness is before the Court, and the testimony which he proposed to give does not appear to be relevant or material, a new trial will not be ordered on the ground that the evidence was excluded.

4. The fact that one of the jury, in the course of the trial, put a question to a witness which appeared to indicate a leaning to the side of the plaintiff, and the further circumstance that the jury presented her with their own taxed fees after the verdict was rendered, are not such indications of bias or partiality as to constitute grounds for a new trial.

The appeal was from a judgment of the Court of Review (JOHNSON, TORRANCE and DOHERTY, JJ., June 30, 1885), setting aside a verdict for the appellant, and ordering a new trial. The following observations made by the learned judges, sitting in Review, fully explain the case:—

DOHERTY, J. (*diss.*) This case is before the court on two

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motions, one for judgment on the verdict, and the other for a new trial. The action was instituted by a widow on behalf of herself and a minor child, for damages against the Canadian Pacific Railway Company. The action was in the usual form. It was pleaded to by a general denegation, and by a further plea that the defendants were not to blame, nor their employees, but that the accident which led to the death of the plaintiff's husband was caused by his own negligence. The answer was general. These pleadings were presented to the judge to fix the facts for a jury. The facts must be fixed in accordance with the issues, and they were so fixed and the parties proceeded to trial. The plaintiff made her evidence and closed her *enquête*, and the defendants made their evidence and closed their *enquête*. The counsel for the plaintiff addressed the jury, and the counsel for the defendants also addressed the jury, and after all this he said there was a witness present whom he desired to examine. Now, what was proposed to be proved by this witness? The defendants said they wished to prove that the machine the unloading of which was the cause of injury, did not belong to the defendants, but to one Scott, of Philadelphia; that Scott agreed with Black, who was in the defendants' employment, that it should be left in the C. P. R. sheds. Scott asked whether it was necessary to send men to unload it, and Black replied that it was not necessary, that he would furnish men for the purpose. I, presiding at the trial, declined to admit this evidence as irrelevant. There is not a word about Scott in the plea. If this evidence came in, the case might go against the plaintiff without her having a word of intimation that there was such a man as Scott in existence. On the principles of pleading, on the principles of the fair administration of justice, can this evidence be allowed? I am strongly of opinion that the evidence should not be admitted. When the machine arrived, it came on Shedden's truck. Scott was not there. It was Shedden's driver that brought it. There is not a syllable in the record to which the evidence can apply. If the case is to be treated in this way, and

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evidence of matters not referred to or indicated in any way in the pleadings are to be admitted, what is the use of pleadings at all? I hold that the evidence of Scott, which, by the judgment of the majority of the court, it is proposed to introduce, is utterly irrelevant and illegal, and I am, therefore, forced to dissent from the judgment.

JOHNSON, J. This is a motion for judgment on the verdict of a special jury, giving a widow and a minor child $2,000 to the one, and $1,000 to the other, as damages suffered in consequence of the death of the husband and father, which was alleged to have been occasioned by the defendants' fault and negligence in unloading a heavy machine from a truck or wagon. The pleas to the action were, 1st, that if any accident occurred it was not owing to the fault of the defendants or their servants; but through the negligence and carelessness of the victim himself; 2nd, a *défense au fond en fait*. The issues were, therefore: 1st. Whether the responsibility rested on the defendants or their servants; 2nd, whether there was contributory fault on the part of the unfortunate man who met his death. There were no other issues; and it is important to observe this, as will presently be seen. The plaintiff's motion for judgment was met by one for a new trial on the part of the defendant, which is made on five different grounds: 1st. The omission from the assignment of facts for the jury of some of the things necessary to be proved. 2nd. Misdirection. 3rd. Partiality on the part of the jury. 4th. The absence of an important witness at the commencement of the trial without any fault of the party, and whose evidence was tendered before the close of the proceedings, but refused by the court. 5th. The discovery of new evidence since the trial. Every consideration urged except the fourth must, in my opinion, be unavailable to the defendant. 1st. The party went to trial upon the assignment of facts as it was, without objection at the time, and without exception or appeal previously. We held this in the case of the *Canada Shipping Company* v. *The Mail* only a month

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or so ago. It is a principle of fairness which I have always seen applied; and if the defendants had got the verdict we should, of course, have heard nothing about it. Hilliard, on new trials (chap. 6), treats the subject exhaustively and cites all the cases in notes. The case of *Cannon* v. *Huot*, 1 Q. L. R. 139, is in point. Besides these considerations, it may be observed that the facts which it was said were necessary to be proved, did not arise under the issue, which was simply what I have stated, and did not in any manner give rise to the question (under our law probably inadmissible) as to the right to recover for an act of a fellow servant. 2nd. The misdirection complained of consisted in instructing the jury that they were to consider the mental suffering of the widow and child of the deceased in estimating the damages. That point was once mooted in England, but the English decisions have also been considered here, and held not to apply to our law. (*Ravary* v. *The Grand Trunk Railway Co.*, 6 L. C. J. 49.) The judgment of Mr. Justice Aylwin will well repay perusal. 3rd. Partiality in the jury. There is nothing in this. After the case was closed and the verdict rendered, and when the members had ceased to form a jury, they agreed to hand their fees to the plaintiff. As to the fifth point, we heard nothing, and we see nothing whatever of the discovery of new evidence, properly so called. But though we see no *new* evidence strictly speaking, discovered afterwards, we see evidence that was not given to the jury, though it was known to exist, because the witness who could give it did not attend in time, and this is the reason given as No. 4 in the motion for a new trial. The defendant, no doubt, took the risk of his witness' non-attendance, and did not move to put off the trial. But before the conclusion of the trial, the witness, whose name was Scott, appeared, and the defendants' counsel applied for leave to examine him before the plaintiff's counsel had risen to reply; and Scott's evidence was excluded. The entries on the record show this beyond doubt or cavil. Now, the liability of the defendants depended upon a very nice discernment of

facts respecting who was the party having the control of this machine, and of the waggon or truck from which it was discharged, that is, whether under the circumstances of the case, the defendants, who, under the issue as it stands, distinctly denied that they were liable, had the control and management of the unloading, or whether the waggon and the operation of unloading was under the control and responsibility of another or others. In the absence of Scott's evidence, the jury found the defendants liable; but it is impossible to read Scott's affidavit without saying, at the least, that if the jury had heard what he had to say, it might very materially have affected the main fact upon which the liability depended. The work I have already cited on new trials discusses the present point in chap. 16; the relief in such cases is not granted precisely on the same principle, as in cases of newly discovered evidence; but it is based upon the fact of due diligence by the party to procure the evidence, and upon the injustice that might follow its exclusion. Upon this subject I would refer to paragraphs Nos. 28, 29, 35, 37 and 42 of ch. 16 of the work I have referred to. For these reasons I would grant a new trial—not because there has been a ruling wrong in itself; for by all the authorities that would not suffice. A harmless error, where full justice has been done, is no ground for a new trial. (See c. 3, par. 8, 9, 12, 13.) But I would grant it here because I cannot feel satisfied that substantial justice can, with any reasonable certainty, be arrived at until the evidence tendered has been heard. I purposely refrain from entering into the particulars of Scott's evidence, as disclosed in his affidavit, because it might to some extent have an effect prejudicial to the merits. I will only say that it appears to me to be such that I think it ought to go to the jury. I would therefore grant the motion for a new trial on this ground only, and not unconditionally, but upon payment of the costs of the first trial by the defendants. This is the view of a majority of the court: We feel that we have to take the responsibility of excluding the evidence of Scott—with the possible con-

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sequence of direct injustice to the defendants; or of assuming at once and conclusively (which we are unable to do), that his evidence could not have the effect of showing that the defendants were not the responsible parties. It may be well to note that our code of procedure seems to go farther than the practice of the English or American courts. Art. 426, paragraph 15, reads that a new trial may be granted "if an important witness was absent at the time of the trial without any fault on the part of the party who had summoned him, and his evidence is still obtainable; and in all cases where the merits of the case could not be discussed, and the party aggrieved and his attorneys are free from blame in that respect." Now if a new trial should be granted for the absence of an important witness, it would seem absurd to say that it should not be granted when he was present and his evidence tendered and rejected. What is wanted is the evidence. What is to be remedied is the absence of the means of getting at the truth, and the remedy seems in either case to be to let in the evidence. The fact is that the principle upon which we are acting in this case, appears to be one that is indispensable to the administration of justice. If we can say we won't hear hear evidence when evidence exists, and is at hand, and is ready to be heard, it would be difficult to give a reason for our sitting here at all. In England lately, at the Chester assizes, I see that Sir James FitzJames Stephen (no insignificant name), after a verdict of guilty, allowed evidence to go to the jury—and evidence consisting merely of the defendant's statement; and it so completely changed the matter, that he was acquitted (1). The court, besides, cannot but be aware that a *force majeure* of a most imperative and unusual kind is what prevented the attendance of this witness, the railway track being submerged and impracticable.—New trial ordered.

(1) See 8 Legal News, p. 186.

The plaintiff petitioned the Court of Queen's Bench for leave to appeal from this judgment, and leave was granted.

J. C. Hatton, Q. C., and *Kavanagh*, for appellant.

H. Abbott, for the respondent, in addition to the points mentioned above, urged the following:—"Because the foreman and others of the Jury who rendered the verdict in this cause, committed certain acts of a nature to warrant a suspicion of partiality of the verdict; and, amongst other things, asked the witnesses various questions tending to show their partiality in favor of the plaintiff; and, moreover, after the rendering of the said verdict, handed to the plaintiff the fees paid them as jurors, and congratulated said plaintiff in open Court upon the verdict rendered."

RAMSAY, J.:—

This is an action by a widow, for herself and daughter, for damages arising from the death of the husband of the former, caused by an accident attributable to the fault of the railway company. The case was tried by a jury, and there was a verdict for the plaintiff. The Company moved for a new trial, setting forth a variety of reasons: first, that the assignment of facts did not cover the whole case, inasmuch as it was not put in issue that the damage arose by the fault of a fellow-servant of the deceased. We think it was immaterial to insist specially on this point, for it seems to be well settled in this country that the employer is liable for the want of skill of a fellow-servant. We assimilate the want of skill of the fellow-workman to defective plant. (1054 C. C.) In England a very marked distinction is made (42 & 43 Vic. ch. 42), based evidently on the element of the individual will of the fellow-servant who causes the accident. For this it may fairly be said that the employer is not responsible, and the English statute, attempting to correct the rough-and-ready rule of English jurisprudence, makes the authority of the person causing the accident, or special directions to do or to omit to do certain things, an element in the

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employers' liability, except in a particular class of cases, namely, those arising "by the negligence of any person "in the service of the employer who has the charge or "control of any signal, points, locomotive engine, or train "upon a railroad." For these last the employer is always liable. There appears to be a little useless refinement in all this. Why should the fellow-servant be in a different position from any other third person? And if the rule is good, why make a distinction between the driver of a locomotive engine and the engineer of a stationary one? I am inclined to think that the whole difficulty arises frem a failure to keep distinct malice and negligence (*dolus* and *culpa*). It is evident that the employer is not *garant* for the wilful wrongdoing of his servant, but why he should not be liable for his negligence in the performance of the duties he is set to do, because his victim is a fellow-servant, baffles all reason to explain.

The second objection is, that in his charge the Judge expressed his opinion as to the sufficiency of the evidence, and misdirected the jury in matter of law. The part of his charge referred to is thus reported: "With reference "to the fifth ground or head of objections, and which is "the only one involving a question of law, the Judge "told the jury in assessing the damages, if they found "for plaintiff, they had right to, and might consider the "nature of the anguish and mental sufferings of the "widowed mother and her orphan child."

We think the Judge has a right to charge the jury as to the matter of fact, and to express his opinion as to the general value of the evidence. It would require a very special exercise of the powers of the Judge in this respect to make us consider it gave any support to an application for a new trial. In this case the charge presents no ground of objection so far. As to the question of law we have to enquire what is meant by "all damages" in the article 1056. It is obvious that it must be taken in a restricted sense. It must mean all damages suffered by some particular person or persons. To understand fully what person is meant we must go back to the origin of the law.

This leads us to consider the common law of France and a statute of recent date, 11-12 Vic., c. 6. There can be no question under the old law that the wife and children of a person killed, by the fault of another, had a right in their own names to compensation for damages; and it seems equally clear that this action covered all the descriptions of damages which such wife or children suffered, whether these damages were material or mental. In the year 1847 an Act was passed by the Legislature of the old province of Canada (11-12 Vic., c. 6), borrowed from an English Act, giving specifically an action of damages for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and the jury were authorized to award such damages as they might think proportioned to the injury resulting from such death to the parties respectively for whose benefit it was taken. There were also provisions that the action should be instituted, in Upper Canada by the executor or administrator of the person deceased, and in Lower Canada by the personal representative, tutor or curator or heir of the deceased, but for the benefit of the wife, etc., that there should be only one action, and that the action should be instituted within twelve calendar months of the death. This statute was reproduced textually in C. S. C., c. 78. Nearly the whole of this was law in Lower Canada before the statute, and the question naturally arose whether this statute was an abrogation of the old law and a substitution of the law of England, or something nearly akin to it on this point in its stead. The question is not without difficulty. The action of the statute is brought for the benefit of these persons, not by them, and their damages are to be proportioned to the injury resulting from such death. Although this view of the case was strongly supported by two judges in the case of *Ravary & The Grand Trunk Railway Co.*, 6 L. C. J. 49, it did not prevail, the majority of the court holding, that the statute must be considered in connection with the common law, which was not abrogated, but only modified by the statute. This was in 1861, when the codification commission was

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at work, and article 1056 C. C. assumes to declare what the law was at that time. It is to be observed that the article 1056 does not appear in the title of obligations as at first reported, and it is not supported by authorities as in the originally reported articles, and, furthermore, nothing can be more evident than this, that the article adopted by the legislature as law was not precisely in the terms of the law as it existed at the time of the decision in *Ravary & The Grand Trunk Railway Co.* Where it was fabricated, when and by whom, I don't know, but I presume it forms part of the extraordinary law-making which only became complete after the local act, which declares the printed copy of the code to be the equivalent of the roll of parliament. However this may be, it is the law now, and it seems to be modified so as to give force to the ruling in *Ravary & The Grand Trunk Railway Co.* The alterations the most obvious are: that the action is by the party suffering, and not by another for his benefit, and that the action can be taken away by indemnity or satisfaction being obtained by the deceased during his life. Nevertheless it is still a serious question whether this article has not abrogated the common law action; and, at any rate, whether an action taken, as this one is, under article 1056, is not a special action, on a right transmitted by the deceased and not an action accruing to the wife for a wrong to herself. If it be only the damages suffered by the deceased, the anguish of mind of the surviving relatives cannot form part of the damages to be considered. If, on the other hand, it be the wife's action, how could it be settled by the husband? Under the old law, it would seem, no settlement with the deceased could have taken away the consort's rights or those of any other person interested. 2 Dareau, ch. 7, No. 9.

In *Ravary & The Grand Trunk Railway Co.*, Mr. Justice Aylwin is reported to have said: "In order to interpret "a statute it was always necessary to look at the common "law as it existed before the statute, for a statute could "only be properly expounded by reference to that." This is very true, and if the learned judge had suggested that

the legislature should perform the operation of looking at the common law before legislating, he would have added some wholesome advice. If this advice were considered by our legislature, our task would often be less difficult than it is. In this case we look in vain for a guide. "*In his quae contra rationem juris constituta sunt, non possumus sequi regulam juris,*" § de leg. 15. The statute was passed to remedy presumed defects in the law of two countries as to a matter in which the legal rule is essentially different. What, then, is the rule of interpretation? I think we must in this dilemma have recourse to the Roman law, which is really the source of all our rules for the interpretation of statutes, and say: *Quod vero contra rationem juris receptum est, non est producendum ad consequentias*, § ad leg. 14. And this was the course adopted by the court in the case of *Ravary & The Grand Trunk.* It is not exact to say that the rule of that case was not followed after the code in *Provost et al. & Jackson* (1). All that was decided in that case was that under the statute the relationship must be proved. If, then, we adopt this principle, the law only cuts off the claim of the consort surviving, if the deceased has settled. If the deceased has not settled, her rights remain as they were before the statute, and consequently she sues, or, as it was before the code, the action is taken for her benefit, in her own right, and therefore the words "all damages" must be held to include all her damages, or all the damages of those for whom she sues. Taking this view of the question, I cannot say that the charge of the learned judge in the court below was not correct in law, and we have no reason to say that the jury gave greater weight to the consideration suggested than it deserved. In fact, it is not suggested that the damages are excessive. The rule we lay down is open to the criticism that it is dangerous to leave a question of this sort to the appreciation of the jury, but when one looks at the matter closely, it will be seen that there is the same check for a wrong appreciation of this kind of damage as for any other. By the evidence,

(1) 13 L. C. J. 170.

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it can be found out what was given for one kind of damage and what for another, and if the estimation is evidently exaggerated, a new trial may be ordered for that reason.

As to the third objection, we do not think there is any ground for supposing the jury were moved by any undue sympathy for the plaintiff or any animosity against the defendant. It is hardly wonderful that the foreman should rejoice at a verdict in which he concurred. Nor can there be any reasonable objection to the jury adding to the *solatium* the amount of their own fees.

As to the fourth objection, we don't think Scott's evidence would have altered the case, whether we consider his own testimony or the probability of his giving a clue to other evidence. It signifies not whether the machine was Scott's or in his possession. It is alleged, proved, and not specially denied, that the deceased was in the employ of the company, and if he was taken off his regular work to do extra work, in the performance of which he perished, I cannot see how it can take away the plaintiff's right.

We are to reverse, and the judgment of the Court of Review on the motion granting a new trial will consequently be reversed with costs.

DORION, C. J. :—

There was no difficulty under the common law, as it existed before the code, and the statutes preceding the code, as to the right of action by one consort to recover damages for the death of the other caused by a third party. Guyot Rep. vo. Réparation Civile, § 4.—10 & 11 Vict. c. 6. The code (Art. 1056) has not destroyed or modified this right; it has merely restricted it to one action at law in favor of the surviving consort, and of the surviving father, mother and children of the deceased;—that is to say: that under the article of the code now existing, if an action is taken by the injured party before his death, his consort and representatives are prevented from taking a further action afterwards; and if he has not taken any

action during his life, but one action can be taken by his representatives generally; and not one action by the wife, one action by the father, and another by the children. This is not an action given to the heirs or legatees of the deceased; it is a special action independent of successive rights, and subsisting upon the relations of parent and child, husband and wife. Guyot, loc. cit.

The principal question to be decided here is, was the judge in the Court below wrong in telling the jury that they might take into consideration the feelings of the widow, in assessing the damages they were to award to her. Following *Ravary* v. *G. T. Ry.*, and the undoubted law of France as it has always existed here, the judge's charge was not contrary to law. The law of France is well expressed by Sourdat in his Traité de la Responsabilité, Nos. 33 and 34.

It is, no doubt, difficult to assess such damages; but juries assess damages to the feelings every day in cases of slander, libel, false arrest, etc. Here the damages were not excessive. We have seen $3,000 damages awarded for a cut finger; and this amount was confirmed by the Supreme Court.

Undoubtedly, the rule as to the measure of damage is different in England, where it has been clearly laid down that the feelings of the bereaved consort, child or parent, cannot be taken into consideration in the estimation of damages. But, in England, there was at one time no action at all at common law, and a special statute had to be passed (Lord Campbell's Act) to establish what right of action there should be. In the United States, the rule differs in different States. Some allow damages for the feelings of the widow, her grief and anguish of mind, and others do not. There, the decisions are apparently governed largely by the statutes in different States, and their interpretation.

CROSS, J.:—

The case comes up on an appeal from a judgment of the Court of Review, setting aside the verdict of a jury and granting a new trial under the following circumstances:

The appellant brought an action against the respondent,

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claiming damages for the death of her husband, killed while in the employ of the Company, engaged in the removal of a weighty iron machine with other of their servants, the iron machine having fallen on him and crushed him to death.

The action imputed negligence to the Company respondents. The case was tried by a jury, who rendered a verdict for the plaintiff of $3,000 damages. The Court of Review set aside this verdict, and ordered a new trial on the ground that the judge had misdirected the jury, on a point of law, in having instructed them that in estimating the damages they might take into consideration, the anguish of mind suffered by the appellant.

If the direction in this particular were wrong, the judgment should be maintained, if otherwise, it should be reversed, and judgment entered for the appellant on the verdict. If the jury took into account the appellant's anguish of mind, they may have given the principal part of their verdict on this ground; but whether much or little, if the direction were wrong, the jury are supposed to have been influenced by it, and their verdict being tainted with error, must be held bad. The question, therefore, is, whether the anguish of mind, suffered by the appellant, is a legal ground for compensation in damages. I think this Court is bound by the precedent of *Ravary* v. *The Grand Trunk Ry. Co.*, in which a *solatium* was allowed to the plaintiff, the widow, for her anguish of mind occasioned by the death of her husband. In that case, there was a strong dissent by two out of three of the judges, and if the matter were entire, and a precedent to be established, I would prefer agreeing with the minority of the judges rather than with the majority.

This subject first engaged the attention of the Legislature in 1847, when the statute of Canada, 10 & 11 Vic. cap. 6, was passed, providing a remedy whenever the death of a person had been caused by such wrongful act, neglect or fraud, as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof. In such case the person who

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would have been liable if death had not ensued, should be liable to an action for damages notwithstanding the death of the person injured, such action to be for the benefit of the wife, husband, parent and child of the person whose death had been so caused.

This was copied from an English Act and applied to the united Provinces of Canada, that is both Upper and Lower Canada, where different systems of law prevailed, and although it is said the remedy previously existed by the law of Lower Canada, yet from the absence of decisions, it does not seem to have been practised in Lower Canada, and as a legislative enactment providing a specific remedy, it seems to me, that in Lower Canada, it was substituted for, and took the place of any supposed previously existing remedy, and had the advantage of approximating to uniformity the exercise of the remedy in each section of the then Province of Canada. It was in force when the case of *Ravary* v. *The Grand Trunk* was tried, and on appeal to this Court, it was in that case determined that the legal remedy existed in Lower Canada before the passing of the statute, and that the jury could award general damages to a widow as a *solatium* to her, and for the benefit of herself and those standing in relation to the deceased, as specified in the statute, in effect deciding the question raised in the present case, that the jury, in estimating the damages, could take into account the anguish of mind of the surviving widow.

The statute seems to assume that the right to be exercised by the surviving widow and the next of kin was the identical right that the deceased could himself have exercised had death not ensued. In that sense, if anguish of mind had to be compensated, it would be his, the deceased's anguish of mind and not that of the widow survivor, but if her anguish of mind could constitute an element in augmentation, there might be no great difficulty in combining her own claim for recourse with that of the devolved right accruing from her deceased husband. There is, nevertheless, a serious objection to this theory. If the husband survived, he would be the legitimate claimant

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for his own anguish of mind, which would in no way affect or lessen the anguish of mind of the wife, nor her consequent right to compensation for this cause, supposing it to be a sufficient ground for pecuniary compensation, consequently, the wife as well as the husband would each have a separate cause of action for their wounded feelings. This is a proposition which has never been, and I believe never will be admitted. It consequently proves to my satisfaction that the anguish of mind of the surviving widow is not an element for which there can be a pecuniary compensation assessed. I have a serious objection to anguish of mind being in any instance a subject of pecuniary compensation, save in cases where the injury complained of is caused by such a tortious act as implies malice or culpable negligence, for which exemplary damages may be given. Where, as in the present case, the injury has resulted from no wilful, wrongful act, nor any fault beyond the omission of some extra precaution, I think the damages should be measured by the pecuniary loss the act has caused to the claimant. I believe it will not be disputed that this is the law of England, and although the civil law may be somewhat more elastic as giving a wider latitude to the discretion of the Judge, I think a careful perusal of the authorities cited by Mr. Justice Badgley in the case of *Ravary* v. *The Grand Trunk*, to which others might be added, will satisfy the enquirer that, as well under the French law as the English, only material loss is a proper subject for compensation in such cases, and not considerations of sentiment or mental distress, which are inevitable at some time in the course of nature, although sometimes anticipated by misfortune, accident or other cause. Where a jury does not interpose, there is less occasion for strictness, but the latitude allowed to the Judge, under the system of the civil law, of tempering the damages according to the circumstances of each particular case, is extremely dangerous, when the same license is transferred to the jury with unlimited authority to assess for mental anguish. I have been discussing the subject as if the case had arisen under the Statute. Art. 1056 C. C., under

which the action is brought, may not have followed the exact terms of the Statute, but its provisions are substantially the same. " In all cases where the person injured " by the commission of an offence or a *quasi* offence, dies " in consequence, without having obtained indemnity or " satisfaction, his consort and his ascendant and descendant " relations have a right.....to recover from the person who " committed the offence or *quasi* offence, or his representa- " tives, all damages occasioned by such death. " I think the damages here indicated are the damages suffered by the deceased, including compensation for the material loss which the survivor sustained by the death, and do not include the anguish of mind of the survivor. Some decisions in several of the United States have allowed anguish of mind to enter as an element in the estimate of damages, others have refused; but I believe the anguish of mind of the survivor has always been considered a cause too remote for compensation in such cases as the present. See Sherman and Redfield on Negligence § 608. It seems to me that the allowance of material damages limited to the pecuniary value of the loss caused to the surviving consort and family, would have been the safe rule to follow, but considering that the question has been already decided in the case of *Ravary* v. *The Grand Trunk Railway Co.*, I concur in the judgment now being rendered by this Court, reversing the order for a new trial and entering judgment for the appellant.

A further question was raised as to the right to have a new trial to admit the evidence of a witness, who arrived too late to give his testimony at the trial. From what appears by the affidavits produced, I think the evidence he could give, not of sufficient importance to warrant a new trial being awarded in order to its production.

The judgment is in the following terms:—

" Considering that it appears by the affidavit of Scott that the facts to which he could testify were either not material or pertinent to the issue in this cause, and that the respondents have not been prejudiced by the refusal

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of the honorable judge who presided at the trial to re-open the evidence in order to take his testimony;

"Considering that there was nothing in the charge of the honorable judge to justify the Court of Review in setting aside the verdict in this cause and ordering a new trial;

"And considering that the amount awarded by the jury is not excessive, and the verdict is justified by the evidence;

"And considering that there is error in the judgment of said Court of Review, etc.;

"This Court doth reverse, etc., and proceeding to render the judgment which the Court below should have rendered, doth maintain the said verdict, and doth condemn, etc."

Judgment of Court of Review set aside and judgment for plaintiff on verdict.

Hatton & Kavanagh, attorneys for appellant.

Abbott, Tait & Abbotts, attorneys for respondent.

(J. K.)

September 25, 1885.

Coram DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.

JAMES McSHANE, JR.
(*Defendant in Court below*),
APPELLANT;

AND

SAMUEL S. HALL ET AL.
(*Plaintiffs in Court below*),
RESPONDENTS.

Charter-party—Time—Rejection of contract.

The appellant, in January, 1879, agreed to charter a steamship, for the carriage of live cattle to England, and the conditions of the charter-party were that the ship should proceed to Montreal with all convenient speed, to arrive there "between" the opening of navigation of 1879, and thereafter to run regularly between Montreal and London,

and to be dispatched from Montreal in regular rotation with other steamers under charter of the same charterer, to be chartered up to 1st October, 1879. Navigation opened at Montreal about 1st May, but the steamship did not arrive there until 18th May, when the appellant refused to load.

Held (following *McShane & Henderson*, M. L. R., 1 Q. B. 264) that there was not a substantial compliance with the contract on the part of the ship, and the appellant was entitled to throw up the charter-party.

The appeal was from a judgment of the Superior Court, Montreal (LORANGER, J.), June 18, 1883, maintaining the action. The judgment of the Court below is reported in 6 *Legal News*, p. 195.

The circumstances of this case are similar to that of *McShane & Henderson*, M. L. R., 1 Q. B. 264, except that the vessel in the present case arrived May 18, instead of June 5, as in *McShane & Henderson*.

W. H. Kerr, Q.C., for the appellant.

H. Abbott for the respondent.

CROSS, J. :—

The present case is not so favorable to the appellant as the Henderson case, the date of arrival being considerably earlier. If this case had come before us first, it is barely possible that a view more favorable to the ship-owner might have been taken, but upon the whole there is no substantial ground for making a distinction between the two cases. The nature of the cargo shows that delay was very serious. I am, therefore, of opinion to reverse the judgment and to dismiss the action of the appellants.

RAMSAY, J. :—

I agree with the judgment, and if this case had come up first, my view would have been the same. There is nothing to prove the pretension that there was to be a succession of steamers during the season of navigation; the ship-owners are not the same, and there is no concert amongst them.

Judgment reversed.*

Kerr, Carter & Goldstein for the appellant.

Abbott, Tait & Abbotts for the respondents.

(J. K.)

* A similar judgment was rendered in *McShane & Milburn*, in which case the ship arrived May 17.

September 25, 1885.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

DAME C. M. JONES,
(*Defendant in Court below*),
APPELLANT;

AND

ED. O. CUTHBERT,
(*Plaintiff in Court below*),
RESPONDENT.

Substitution—Within what limits it may be created—C. C. 932 *—Accretion.*

HELD:—Confirming the judgment of the Superior Court (M. L. R., 2 S. C. 23), that by the old jurisprudence introduced into this province, and which was not affected in this particular by the Imperial Statute of 1774, (14 Geo. III, c. 83), but was still in force in August 1798, when the will in question was made, a substitution created by will was limited to two degrees exclusive of the institute.

2. Degrees of substitutions are counted by heads ("par têtes"), and not by roots ("par souches"). When the share of one among several who took conjointly passes to the others by his death, such transmission is reckoned an additional degree as regards the share so transmitted.

The appeal was from a judgment of the Superior Court, Montreal (MATHIEU, J.), Jan. 3, 1885. The judgment of the Court below is reported in M. L. R, 2 S. C. 23.

The case was submitted on the factums, May 26, without oral argument. The pretension of the appellant is stated in the factum as follows:—

"As appears by the judgment rendered by the Superior Court, the question submitted to this Court is solely that of determining whether the two degrees of substitution, according to the Ordonnances of Moulins and Orléans, are still to be accepted as the rule limiting substitutions in this country, previous to the Code, and if each of the recipients of property substituted must be held to constitute the degree, when the substitution is made to the issue or generally of the first *grevé* or institute.

"The Codifiers apparently reported that by the provisions of the Imperial Statute of 1774, and Provincial Act of 1801, these restrictions to the rule of disposing of property in perpetuity were repealed.

"The appellant having purchased the property which was subject to the entail created by the Will of the late Hon. James Cuthbert, of Aug. 1798, and transmitted to C. O. Cuthbert, the other appellant, by inheritance from his father; and two-thirds of which reverted to him by the predecease of his brother and sister, and the children of the said C. O. Cuthbert, and the Curator to the substitution having contested the right of the said C. O. Cuthbert to dispose of the said property free of the substitution for the two-thirds transmitted to his father by the predecease of said appellant's brother and sister, the present appellant contested the right of the plaintiff to claim the price of the sale by reason of such pretention on the part of the substitute. If their pretension is well founded the sale made by said respondent to appellant would be of property to which he had no absolute title and consequently void. Appellant respectfully submits that the sale cannot be maintained and enforced against her, unless this Court confirm the judgment of the Superior Court, holding that the report of the Codifiers was inaccurate with respect to the abrogation of the restrictions relative to substitutions to three degrees, as provided by the Ordinances of Moulins and Orléans."

For the respondents it was contended as follows:—

"Nous soumettons que, lors du testament, comme depuis la loi a limité toute substitution à deux degrés outre l'institué, et que, pour la part venant de Dme. Lévesque et de Charles Alfred, c'est-à-dire la partie de la seigneurie qui a été vendue à l'appelant, la substitution est épuisée.

"La première loi qui a limité la substitution à deux degrés est l'Ordonnance d'Orléans en 1560, collection d'Isambert—vol. 14, p. 80.

"L'article 59 est dans les termes suivants:—'Et pour couper racine à plusieurs procès qui se meuvent en matière de substitution, défendons à tous juges d'avoir aucun

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égard aux substitutions qui se feront à l'avenir par testament et ordonnance de dernière volonté ou entre-vifs, et par contrat de mariage ou autres quelconques, outre et plus avant deux degrés de substitution, après l'institution et première disposition, icelle non compris.'

"L'Ordonnance d'Orléans de 1566, Art. 27, p. 204, 14v. coll. d'Isambert, est dans les termes suivants :—'Et ampliant l'article de nos ordonnances faites à Orléans pour le fait des substitutions, voulans oster plusieurs difficultés mues sur les dites substitutions auparavant faites, desquelles toutefois le droit n'est encore échu ni acquis à aucune personne vivante ; Avons dit, déclaré et ordonné, que toutes substitutions faites auparavant notre dite ordonnance d'Orléans, en quelque disposition que ce soit, par contrats entre-vifs ou de dernière volonté, et sous quelques paroles qu'elles soient conçues, seront restraintes au quatrième degré outre l'institution ; excepté toutefois les substitutions desquelles le droit est échu et déjà acquis aux personnes vivantes, auxquelles n'entendons préjudicier. Ordonnons aussi, que, dorénavant, toutes dispositions entre-vifs, ou de dernière volonté, contenant substitution, seront pour le regard d'icelles substitutions publiées en jugement à jour de plaidoierie, et enregistrées les greffes royaux plus prochains des lieux des demeurances de ceux qui auront fait les dites substitutions, et ce dedans six mois, à compter, quant aux substitutions testamentaires, du jour du décès de ceux qui les auront faites et pour le regard des autres, du jour qu'elles auront été passées, autrement seront nulles, et n'auront aucun effet.'

"La jurisprudence du parlement de Paris a confirmé ces deux ordonnances, mais il y avait certaines juridictions qui refusaient parfois d'accepter les dispositions de ces ordonnances, alors a été promulguée l'Ordonnance de 1747, (Thevenot d'Essaulles, *Des Substitutions*, p. 463,) dont l'article 59 se lit comme suit :—'L'article 59 de l'Ordonnance d'Orléans sera exécuté, et, en conséquence, toutes les substitutions faites, soit par contrat de mariage ou autre acte entre-vifs, soit par disposition à cause de mort,

en quelques termes qu'elles soient conçues, ne pourront s'étendre au-delà de deux degrés de substitution outre le donataire, l'héritier institué ou légataire, ou autre qui aura recueilli le premier les biens du donateur ou du testateur. N'entendons déroger par la présente disposition à l'article 57 de l'Ordonnance de Moulins, par rapport aux substitutions qui seraient antérieures à la dite ordonnance.

"Cette ordonnance, quoique non enregistrée au conseil supérieur de Québec, est d'un grand secours pour nous faire connaître le droit existant en France, car elle a été considérée par les commentateurs comme confirmative du droit antérieur—Pothier, *Substitutions*, sect. 7, art. 4, page 570.

"Chose assez étrange, notre code semble donner comme droit nouveau cette disposition des ordonnances précitées, art. 932, C. C. C'est que, dans leur cinquième rapport, les codificateurs, après beaucoup d'hésitation, semblent adopter l'opinion que l'acte impérial de 1774, cap. 23, et l'acte provincial de 1801, en donnant la liberté illimitée de tester, a autorisé les substitutions perpétuelles. Nous ne pensons pas que le but du législateur en 1801 fût de réduire à néant les dispositions prohibitives du droit français relativement aux substitutions, dispositions qui doivent être considérées d'ordre public, d'autant plus qu'il n'y a eu aucune abrogation expresse de ces lois. Voici ce que disait sir L. H. Lafontaine dans la cause de *Blanchet* v. *Blanchet*, 11 L. C. R. 204:—'Tout individu avait, avant nos deux statuts de 1774 et 1801, comme il a continué de l'avoir depuis, le pouvoir de disposer de ses biens mobiliers d'une manière illimitée, cependant il ne pouvait pas, et ne pourra pas les donner à charge de substitution, parce qu'une loi positive, à laquelle les statuts de 1774 et 1801 n'ont pas touché, le défend. Un testateur est donc obligé, dans la disposition qu'il fait, concernant sa succession mobilière, de subir les exigences de cette loi, il doit en être de même de la loi qui fixe les deux degrés d'une substitution de biens immeubles. Du reste, les substitutions sont contraires à l'esprit et à l'objet de

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notre nouvelle législation sur les testaments, il ne faut donc pas les étendre.'

"La législature, en adoptant l'article 932, tel qu'il est formulé, dans notre code civil, semble avoir désapprouvé l'opinion des codificateurs. La loi anglaise, tout aussi bien que la loi française, est contre la perpétuité des substitutions (Jarman, *on Wills*, vol. I, page 259. Cette autorité démontre que les codificateurs se sont trompés quand, pour étayer leur opinion, ils ont prétendu qu'en Angleterre les substitutions pouvaient être créées pour un temps limité.

"Il est à remarquer que le testament en question a été fait en 1798 et a pris force cette année-là, avant le statut de 1801, lequel, par conséquent, ne s'applique pas à cette cause. Il n'y avait alors que le statut de 1774 sur lequel on pouvait s'appuyer. Or il a été décidé par le Conseil Privé dans la cause de *Durocher* v. *Beaubien* (307, Stuart's Reports) que le statut de 1774 n'avait pas étendu la liberté du testateur et que le statut de 1801 avait seul eu cet effet. Les codificateurs eux-mêmes se sont appuyés surtout sur le statut de 1801. Les effets du testament doivent être déterminés par la loi en force en 1798.

"Maintenant les degrés sont-ils épuisés? Autrefois il y avait division parmi les auteurs sur la manière de compter les degrés, et la jurisprudence se ressentait de cette divergence d'opinion. Les uns voulaient que les degrés fussent comptés par tête, les autres par souches. L'Ordonnance de 1629 décida le point contesté en ordonnant (article 124) que les degrés de substitutions seraient comptés par tête et non par souches, c'est-à-dire que chacun de ceux qui auraient appréhendé et recueilli le fidéicommis, ferait un degré, sinon que plusieurs d'eux eussent succédé en concurrence comme une seule tête, auxquels cas ne seront comptés que pour un seul degré.

"Les parlements de France, à l'exception de celui de Toulouse, ont accepté les dispositions de cette ordonnance. La dernière disposition de l'article 124 de l'Ordonnance de 1629, doit s'entendre dans ce sens, que ceux qui recueillent concurremment en même temps et en vertu d'un

même titre forment un degré, vis-à-vis de ceux qui doivent recueillir après eux. Comme, dans l'espèce, les enfants de James ont reçu concurremment, en vertu d'un même titre, par conséquent, pris ensemble, ils ne forment qu'un degré vis-à-vis de ceux qui doivent recueillir après eux, mais au décès de l'un d'eux, celui qui recueille, que ce soit un enfant du grevé ou son frère, celui-là forme un autre degré, c'est-à-dire que chaque grevé forme un degré pour sa part et portion.

"Thévenot d'Essaulles, *Substitutions*, art. 33, p. 46, dit que les degrés sont comptés par tête et non par souches ou générations, de telle manière que chaque personne soit comptée pour un degré. A la page 463, il cite l'article 30 de l'Ordonnance de 1749 qui déclare que les substitutions ne pourront s'étendre au-delà de deux degrés outre l'héritier institué et, dans une note (2), il ajoute que la substitution finit de droit quand elle a parcouru deux degrés. Elle a parcouru deux degrés quand il y a eu deux substitués qui ont recueilli l'un après l'autre. Chaque personne qui recueille successivement à titre de substitution fait un degré. Voir pages 376, 377, 466. D'Aguesseau: *Questions sur substitutions*, pages 100 à 105, 112-113-114.

"Appliquant ces règles à l'espèce, nous trouvons que James Cuthbert a recueilli de son père, l'honorable James Cuthbert, voilà un degré; au décès de ce dernier, ses enfants, Mme. Lévesque, Alfred Cuthbert et l'intimé ont recueilli, voilà le second degré. A la mort de Mme. Lévesque, ses frères, Alfred Cuthbert et l'intimé ont recueilli sa part, voilà le troisième degré, c'est-à-dire les institués ont recueilli, et la substitution, quant à la part de Mme. Lévesque, a été éteinte. De même pour la part d'Alfred, lorsque l'intimé a recueilli, c'était le troisième degré, et la substitution a pris fin. Ces deux parts forment les deux tiers vendus à l'appelante."

The judgment in appeal was delivered as follows by

RAMSAY, J:—

This was an action by the respondent to recover from the appellant Jones the purchase money of certain seign-

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iorial rents sold by respondent to Jones. Jones resisted the action on the ground that the respondent was a *grevé de substitution* and could not give a title, and the other appellants intervened as the *appelés*. The facts are these: the Hon. James Cuthbert made his will on the 4th of August, 1798, and died shortly after, that is before the 19th October of that year, leaving his will substantially unchanged. By this will he bequeathed his property to his son James, and substituted it to his son's children and to their children for 150 years. In order that the question may be fully understood, the dispositions of the will, in so far as regards this substitution, are as follows:—

"That my said trustees do permit and suffer the said Lieutenant James Cuthbert to use, occupy, possess and enjoy the rents, issues and profits of the Seigniory of Berthier, including the parish of St. Cuthbert, in the district aforesaid, agreeable to the Grants, ratification of His Most Christian Majesty, charters, and contracts thereof, with all the rights, privileges and honors thereto appertaining for and during the term of his natural life, without impeachment of waste, subject to certain legacies."

The will then goes on:—

"And from and after the death of the said James Cuthbert, that my said trustees do permit and suffer the heirs of his body, lawfully begotten, to use, occupy, possess and enjoy the rents, issues, and profits of the said Seigniory of Berthier in like manner for and during his, her or their natural life or lives; but in case the said Lieutenant James Cuthbert should die without issue of his body, lawfully begotten, or such issue should die without issue of his, her or their bodies, lawfully begotten, then the said trustees shall permit and suffer the said Ross Cuthbert, etc.

"And I do hereby desire and express my will that all my said seigniories, manors and Lordships, to wit the Seigniory of Berthier, etc., shall be kept entire unto whomsoever the same may come or descend according to the order and limitations hereinbefore contained, and shall continue so to be from one generation to another for and

during the aforesaid term of 150 years to be fully complete and ended, during which term it shall not be lawful for any person or persons whatsoever in any manner to hypothecate, charge, mortgage, sell or alienate the said estates or any part thereof, but every such hypothecation, charge, mortgage, sale or alienation that may be made or granted by any person or persons shall be and is hereby declared to be utterly void and null to all intents and purposes whatsoever, save and except only a reasonable dower for the life of the persons to whom the same may be granted, or by way of a moderate rent charge as of provision for and during the life or lives of a child or children, and at the expiration of the said term of 150 years, the reversion of the said estates shall belong and appertain according to the course of descent or succession which may then prevail or be in force to such as then may be legally possessed thereof by virtue of this, my will, and to their heirs and assigns for ever."

James, the son, took possession under the will, and died in 1848, leaving three children—Alfred, Edward Octavian the respondent, and Mme. Levesque. Alfred and Mme. Levesque died without issue, when the whole property was re-united in the hands of the respondent, and he sold to the appellant Jones the two-thirds he had inherited through Alfred and Mme. Levesque. As regards these two-thirds, was respondent the last *grevé*? This is the question we have to determine.

Before entering on the question of the rule to be observed in counting the degrees of substitution, it is proper to observe that the will was made, and the testator died, while Sec. 10 of the Imperial Act 14 Geo. III, c. 83, was in force, and before the enactment of the Provincial Act 41 Geo. III, c. 4. At an early time it was held that the former of these acts only extended the subject over which the devisor had rights, and did not affect in any manner the devisee. This principle was adhered to in the case of *Durocher & Beaubien* (1). There might possibly be good

(1) Observations of the Master of the Rolls in *Durocher & Beaubien* decided in the P. C. in 1828; Stuart's Rep. 308.

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reason for arriving at an interpretation of the section 10 of the Act of the 14 Geo. III, different from that of the Privy Council, but the interpretation was accepted, and the provincial legislature passed the Act of the 41 Geo. III in consequence. We are therefore of opinion that when this will was made, and when the testator died, the limitation of substitutions to three degrees was the law of this Province, whatever it may have been from the passing of the 41 Geo. III. until the coming into force of the Civil Code.

How are these degrees to be counted? This is a question of greater difficulty. Under the ordinance of 1747, the point is made perfectly clear. That law insists on the pure and simple rule, that each person in whose favour the substitution opens, and who takes under the will, counts as a degree. (Art. 34. See Furgole 183.) But the ordinance of 1747 was after the establishment of the Conseil Supérieur of Quebec, and it was not registered there. Not being published in the Province of Quebec, it was not in force there, for the constitutional rule of France under the old *régime* seems to be indubitable, that a statute has no force in any jurisdiction until its publication by the Parliament of the Province. We must therefore go further back, and in doing so we come to the Ordinance of 1629. The article 124 of that ordinance declares: "Voulons que dorénavant les degrés des dites substitutions et fidéicommis par tout notre Royaume, soient comptés par tête, et non par souches et générations: c'est-a-dire chacun de ceux qui auront appréhendé et recueilli le dit fidéicommis, fassent un degré, *sinon que plusieurs d'eux eussent succédé en concurrence* comme une seule tête, auquel cas ne seront comptés que pour un seul degré. Declarons nuls tous les arrêts qui seront ci-après donnés au contraire de ces présentes, nonobstant tout usage ancien ou autrement, et sans préjudice des arrêts ci-devant intervenus."

This ordinance was registered both in Paris and Toulouse with *remontrances*. The remonstrance of Toulouse is given at length by Neron. That Parliament adhered to its jurisprudence, to count *par souches* and not *par têtes*.

The *remontrance* of Paris is not given specially, but Neron has a note on the article which states the difference between the jurisprudence of Toulouse and Paris to be, that the former counted the degrees by *souches*, the latter by *têtes* without any modification. We might, perhaps, without much presumption, conclude that the *remontrance* of Paris bore on the modification "Sinon," &c., fearing it might be an innovation to the law there. Whether this be so or not, and what the legal effect of a *remontrance*, strictly speaking, was, it may, perhaps, be difficult satisfactorily to decide; but there is a marked difference between the English and the French theory as to the durability of a statute. In England it seems to be considered that a law does not fall into disuetude, and that it is in force until it is repealed; while in France a statute loses its effect by dis-use. If this view be correct, nothing is more clear than that the ordinance of 1629 was not enforced. Henrys, who calls the ordinance *très-sage et très judicieuse dans toutes ses dispositions*, says: it was not *observée*, that it fell into the disgrace of its author, and therefore that the question was still *entière*. He then goes on to examine *the question*, which turns out not to be the distinction of the ordinance of 1629 ("Sinon" &c.), but whether as a general rule the succession should be by *souches* or by *têtes*. Henrys preferred the jurisprudence of Toulouse to that of Paris, but it is impossible to avoid the conclusion that he thought Paris, before 1629, did not admit any modification to the *par têtes* rule. See Henrys 547. Suite du Liv. V, Qu. 94 Nos. 24 and 28. Henrys d. 1662, Ricard, (d. 1678) is evidently in favour of the art. 124, Ord. of 1629. Bretonnier (d. 1727) says it would be *à propos* "*d'ordonner que les degrés seront comptés par tête dans toute l'étendue du Royaume*," for all *substitutions fidéicommissaires*. Ques. de droit, 293. Bourjon, the 1st. ed. of whose work appeared in 1747 (the year of the ordinance of substitutions not registered here), published a second edition in 1770, in which he says:

"Plusieurs substitués étant appelés conjointement pour jouir en même temps des biens substitués, par exemple,

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si un père substitue à son fils tous les enfants, petits-enfants de lui testateur, et qu'il ait porté ensuite la substitution plus loin, tous ces petits-enfants du testateur venant à recueillir la substitution, ne font tous ensemble qu'un seul dégré ; ils sont tous conjointement appelés ; ils ne forment donc tous que le premier degré ; ce qui, par la même raison, aurait lieu dans le cas même que des arrières petits-enfants, par représentation de leur père, concourraient avec leurs oncles, pour recueillir l'effet et le bénéfice de la première ouverture d'une telle substitution ; c'est toujours premier degré, nonobstant le nombre et la qualité ou proximité de ceux qui la recueillent ; *tel était l'esprit des premières ordonnances* qu'une postérieure a fixé."

He quotes in support of his opinion the ordinance of 1629, and says later : " Usage qui ne peut être contesté et qui ne peut plus varier puisque c'est la disposition de l'art. 34 du premier titre de l'ordonnance de 1747."

Art. 34 of the ordinance of 1747 is in these words :

Article XXXIV. En cas que la substitution ait été faite au profit de plusieurs frères, ou autres appelés conjointement, ils seront censés avoir rempli un degré, *chacun pour la part et portion qu'il aura recueillie dans les dits biens ; en sorte que si la dite part passe ensuite à un autre substitué, même à un de ceux qui avaient été appelés conjointement, il soit regardé comme remplissant à cet égard un second degré.*"

Again, Pothier says : " A Paris *on a toujours compté* autant de degrés de substitution qu'il y avait de personnes qui l'avaient recueillie successivement avec effet, quoique ces personnes fussent dans un même degré de parenté. A Toulouse au contraire les degrés de substitution se comptaient par les degrés de parenté." (Tr. des Subs. 571.)

We have therefore come to the conclusion that the ordinance of 1629, if it be considered that by the sentence " sinon," &c., it was intended to modify the former law of the *coutume de Paris*, (1) was not observed, and fell into

(1) On the other hypothesis, that the words " *sinon que*," &c., did not change the older law of the *coutume de Paris*, a great authority, which supports this judgment, may be referred to. Among the questions submitted by Chancellor d'Aguesseau to the courts and parliaments as pre-

dis-use, we are consequently thrown back on the law as it was interpreted in the jurisdiction of the *Parlement de Paris*, and under the law so interpreted, we think, each person who effectually received his share of the property counted for one degree. We are therefore to confirm the judgment of the Court below with the costs of this appeal.

Judgment confirmed.

Laflamme, Huntington, Laflamme & Richard, attorneys for appellant.

Lacoste, Globensky, Bisaillon & Brosseau, attorneys for respondents.

(J. K.)

paratory to the ordinance of 1747 was one bearing directly on the point: Dixième question.

Si ceux qui sont appelés conjointement à une substitution doivent être comptés pour un seul degré ou pour plusieurs?

M. le Procureur-général de Paris answered: "Cette question toute unie n'en est pas une; en effet, si plusieurs appelés successivement forment plusieurs degrés, la même raison veut que plusieurs appelés conjointement ne forment qu'un degré; aussi tous les auteurs, les parlements, l'ord. de 1629, les arrêtés de M. le Président de Lamoignon, tout se réunit pour cette décision. On pourrait, peut-être, pour lever toute équivoque, ajouter le mot *concurremment* qui se trouve dans l'article XLIV de ces arrêtés; on pourrait même y ajouter pour lever encore un autre doute, ce que le parlement d'Aix a ajouté, soit que les substitués acquièrent de leur chef, ou caducité, ou par accroissement, quoique on croie ces expressions surabondantes."

"Mais de cette question il en naît naturellement une autre, qui est peut-être la seule véritable question; c'est pour le cas quand la part recueillie par un des substitués parvient aux autres par son décès, parce que, à prendre la chose dans l'exacte règle, il se trouve un nouveau degré par rapport à cette portion; c'est ce qu'a fort bien remarqué le parlement de Flandres." Questions concernant les substitutions d'Aguesseau, p. 115.

Here is what the *Parlement de Flandres* said:

Nous jugeons que ceux qui sont appelés conjointement à la substitution font chacun un degré pour leur part, et quand la part de l'un passe aux autres, cela fait un second degré à l'égard de cette part; et à mesure que les autres appelés décèdent, on compte à l'égard de chaque part autant de degrés qu'il y a des personnes qui en profitent successivement. D'Aguesseau, Institutions, 113.

On the answers to these different questions d'Aguesseau made notes, &c., at p. 559, he treats of Question 10. First he speaks of the different jurisprudence and opinions of the parlements, and classifying them says: "Cela supposé, *sur la première espéce* (that persons called together form

November 27, 1885.

Coram DORION, C. J., MONK, RAMSAY, CROSS, JJ.

CHARLES A. L. MALBŒUF,
(*Plaintiff in first instance*),
APPELLANT;

AND

ESTHER LARANDEAU,
(*Defendant in first instance*),
RESPONDENT.

Appointment of experts—C. C. P. 322, 323—*Acquiescence in appointment of one expert.*

HELD:—That where the Court has appointed one expert only, and the expert has proceeded to act without protest or objection by the parties, they will be presumed to have acquiesced, and the report will not be set aside on the ground urged subsequently that the Court should have appointed three experts.

The appeal was from a judgment of the Court of Review. The facts are stated in the opinion of Cross, J. The only question of law involved in the case was the pre-

one degree), nulle diversité de sentiment, ni entre les auteurs, ni entre les parlements; tous conviennent que les enfans et même les étrangers, tous substitués conjointement pour recueillir en même temps la même succession, ne forment qu'un degré, et telle est la décision précise de l'article CXXIV de l'ord. de 1629, à laquelle l'article XLIV des arrêtés de M. le Président de Lamoignon, titre des fidéi-commis, est entièrement conforme."

"*Sur la seconde espèce*, deux sortes de parlements, ceux qui n'ont pas seulement prévu la difficulté, et ceux qui l'ont sentie."

"Tels sont Grenoble, etc.

"Les autres ont prévu, ou du moins entrevu la difficulté, et ils ne s'accordent point entr'eux pour décider que quand la part de l'un des substitués passe aux autres, cela fait un degré pour cette part, et que l'on compte autant de degrés à l'égard de chaque part, qu'il y a des personnes qui en profitent successivement, Flandres très-expressément ET PARIS DE MÊME."

The chancellor then goes on to mention the parliaments which impliedly adopt the view of Flandres and Paris. Then he refers to the view of Toulouse which adopts the rule of counting all the degrees *par souches et non par têtes;* and Alsace which adopts the same view.

tension that the appointment of a single expert was illegal: C. C. P. 323.

Pagnuelo, Q. C., for the appellant, submitted that the judgment appointing a single expert was in direct contradiction to articles 322 and 323 of the Code of Procedure.

CROSS, J.:—

The action was by Malbœuf, a contractor, against Mad. Larandeau, proprietor, for $162.64, the price of the construction of a stone foundation to a house, at the rate of $8 per toise as per written agreement, Malbœuf alleging that the work had been completed according to contract, and had been accepted by Made. Larandeau.

Made. Larandeau pleaded that the work was not to be paid for until finished; that it was never completed, delivered to, nor accepted by her; that it was badly constructed and incomplete; that from its imperfection the cold was admitted into the house, rendering it uninhabitable and causing her damage; that she had offered to pay for the work and was still willing to do so on the same being completed; that she had called on Malbœuf to complete his work, which he failed to do, and she was willing and offered to have it determined by experts what it would cost to finish the work.

Malbœuf replied that the work had been completed and accepted long before the action, and that Made. Larandeau had offered to pay the whole amount demanded, as well before as after action brought.

Proof was made by both parties, and the judgment thereon by the Superior Court held that the plaintiff had made out his case, and that the defendant had failed to prove her plea, and therefore was condemned to pay the amount demanded.

The case went to review, and there the judges, being evidently dissatisfied with the conclusion arrived at by the judge in the first instance, ordered an *expertise* by a single expert, the result of which was ultimately in conformity with the judgment subsequently rendered by the

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Superior Court and now appealed from. The expert found that the work was badly executed, very imperfect, and would cost to complete it $100.

The report of the expert was objected to by Malbœuf, and is still objected to as one of the reasons against the judgment now appealed from. The appellant contends that the first judgment was based upon and justified by the evidence; that there is besides proof that Made. Larandeau offered to pay the entire demand, less the costs; that the work had been really received and accepted without objection; but principally that the *expertise* by one expert was unauthorized by law, was void and should have been rejected.

It is quite true that the Code of Procedure, articles 321, 322 and 323, only seem to contemplate an *expertise* by three experts. But an examination of the whole case leads us to believe that the first judgment was erroneous. There is proof in the depositions of Lacombe, Lessard and others, that the work was absolutely worthless and would have required entire renewal, so that if the *expertise* allowed him something for his work he cannot complain. I think, therefore, it is unnecessary to decide whether the *expertise* was unauthorized by law or not.

As to the pretended acceptance of the work by Made. Larandeau and her offer to pay, there is some proof on the subject, but I do not find that the plaintiff's pretension in this respect is made out, nor is it to be readily presumed. Madame Larandeau appears to have said that she would pay if the plaintiff would finish the work, but she never went further than this, and such language would not bind her unless the work was satisfactorily completed, which was never done. Although the case is not without difficulty on the proof, we are of opinion that the equity on the whole is with the respondent, and that her position is also justified by law. The judgment appealed from is therefore confirmed.

DORION, C. J., said that without deciding whether it was a case in which three experts were required under the Code, it was evident that Malbœuf had consented to

go on before one expert. There was an *acquiescement* by the parties, and it was too late to urge the objection that three experts should have been appointed.

RAMSAY, J., concurred.

Appeal dismissed.

Pagnuelo, Taillon & Gouin, attorneys for appellant.
St-Pierre & Bussière, attorneys for respondent.
(J. K.)

January 21, 1886.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

DAME ALLAS FRENCH ET AL.
(*Defendants in Court below*),
APPELLANTS;

AND

DAME ELIZABETH McGEE ET AL.
(*Plaintiffs in Court below*),
RESPONDENTS.

Testamentary executor—Delegation of powers—Grounds for removal from office.

HELD:—Where testamentary executors transferred the control of the estate to another person, who paid the monies belonging to it into a bank in his own name, and afterwards drew them out: that the Court below exercised a proper discretion in removing the executors from office, even without evidence of fraudulent intention or actual dissipation of the property.

The judgment appealed from was rendered by the Superior Court, at Sherbrooke, Jan. 14, 1884, (BROOKS, J.), maintaining an action to remove the appellants from office as executors, and also maintaining a *saisie-arrêt*. The *considérants* are as follows:—

"Considering that plaintiffs have established the material allegations of their declaration, and that defendants

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in their said quality of executors of the last will and testament of the late James McGee, have, in and by their pleadings in this cause, admitted to have belonging to plaintiffs, and pleaded a tender of $2,631.34, which tender, however, has not been repeated or the money brought into Court for plaintiffs,—and that said defendants in their said quality have declared their willingness that judgment should be entered up against them for said sum, but without costs, and for such other sum as taking into consideration the pretensions of Dame Allas French personally, this Court shall determine, but contests the right of plaintiffs to have them declared ousted and divested of their said office of executors;

"And considering further that it hath been proved that said defendants, as executors of said will, did prior to the making of the inventory of the estate and succession of the late James McGee, make over the principal part of the estate and succession of said late James McGee to Alfred Rogers, mentioned in the declaration and one of the tiers-saisis in this cause, to wit, all the moneys in the Eastern Townships Bank, without security, and apparently without receipt, and that afterwards, to wit by *acte* of mandate so called, passed before Mackie, Notary Public, on the 20th of January, 1883, they appointed, contrary to the provisions of article 913 of the Civil Code, said Alfred Rogers their mandatory, giving him or pretending to give and confer upon him all and every the powers conferred upon them by said James McGee, as executors under his last will, and did in fact divest themselves of all and singular the estate which they had in charge, and intrusted the same wholly to said Alfred Rogers without security;

"And considering that it has been fully established in this cause that said defendants had, by so divesting themselves of the whole estate entrusted to them, and entrusting the same to said Alfred Rogers, failed and neglected to act as such executors, and wholly failed to fulfil the duties imposed upon them by the last will and testament of said late James McGee, and has placed the said estate

out of their control, and the said plaintiffs had good reason to complain thereof;

"And considering that said defendants have by this action as proved in this cause, especially by the tender which they made through the instrumentality of said Alfred Rogers to plaintiffs, subsequent to the return of this action, to wit, on the 5th of June, 1883, of the said sum of $2,631.34, being in the proportion of $877.11 to each of said plaintiffs, (but which money was not brought into Court though so stated in the pleadings), claiming this to be the full share due said plaintiffs, assumed to recognize the pretensions of one of them individually, to wit, of said Allas French, in and to a much greater share of said estate than she was legally entitled to, said sum being offered as and for the full share in said estate and being wholly insufficient, the said Dame Allas French being only entitled to one-third of the whole estate;

"And considering that said Dame Allas French has wholly failed to establish that she is entitled to any further or greater share in said estate than as is given in said will, and that she hath accepted the special legacy therein given her and was also a party to the inventory of said estate, and acquiesced therein;

"And considering that said defendants, in their said quality have wholly failed to perform the duties entrusted to them by said testator according to the true intent and meaning thereof, and the wishes of said testator, but have by their acts in connection with the administration of said estate proved their incapacity to administer the same, as is also admitted by their delegating the entire administration thereof to said Alfred Rogers a stranger;

"And considering that said plaintiffs have shown that they are entitled under said will to one-half of said estate, amounting to the sum of $3,891.30;

"And considering that said plaintiffs are also under the circumstances entitled to a writ of attachment in the nature of a *saisie-conservatoire* to attach said sum in the hands of said garnishee Alfred Rogers, who admits the possession thereof and the said sum of money so belonging to them;

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"And considering further that said defendants in said quality have rendered an account of the affairs of said estate, and have made an offer, which however was not repeated by the deposit of the amount in Court with their pleas, of the sum which they claim was due plaintiffs under said will of said late James McGee, being as appears by the evidence wholly insufficient;

"And considering that said defendant Dame Allas French has wholly failed to sustain her pretensions urged in her plea filed in this cause;

"And considering further that said defendant William French, has failed to establish any just reason why plaintiffs are not entitled to their just share in said estate, to wit, to the sum of $3,892.30, but has admitted his inability to act as executor, doth in consequence dismiss the pleas of said defendants, filed by them as in their quality of executors, and by them separately, with costs, and doth declare said plaintiffs entitled from said estate, according to the proof in this cause, to receive the said sum of $3,892.30, and adjudges and declares and condemns said defendants, as well in their said quality as individually, jointly and severally to be indebted and to pay to plaintiffs the said sum, etc."

W. H. Kerr, Q.C. for the appellants, submitted:—1. That they were acting for the best, in giving a power of attorney to the said Alfred Rogers, to transact the business connected with the estate; 2. That the said Rogers was an intimate friend of the late James McGee, knew all his affairs, and was a man of experience, and of implicit honesty; 3. That if any delay occurred in settling the estate, it was caused by respondents themselves; 4. That the money had been withdrawn from the bank for the express purpose of paying the legatees; 5. That respondents' action was brought prematurely, before the expiration of the year and a day allowed by law; 6. That their action is unfounded, their recourse being by action to account.

William White, Q. C., was heard on the part of the respondent, in support of the judgment.

RAMSAY, J.:—

This is an action to dismiss the defendants from the executorship of the will of the late James McGee. It is established that the defendants considered themselves to be totally unfit to manage the estate and handed the administration entirely over to one Alfred Rogers; that Rogers took all the money of the estate and paid it into his own name at the bank; that he then drew it out of the bank and kept it in his own pocket; and that the balance which the defendants admit to be due to plaintiffs and which they promised to pay, had not been tendered.

The defendants attempt to justify their proceedings by saying that Rogers was the person suggested by the deceased as the proper person to assist his widow, the female appellant; that the money was placed in Rogers' name to enable him to deal with it on his own cheque, and that when he drew it from the bank altogether it was to settle the liabilities of the estate.

It would be very difficult indeed to imagine any circumstances, short of absolute dissipation of the property, that could not be explained in that way; but an explanation of this kind is not satisfactory. It is possible that all the defendants say is true and that they have no intention to make away with the estate; but they have exposed it in a way they are not entitled to do, and we do not feel ourselves justified in reversing the judgment.

Appeal dismissed.

Kerr, Carter & Goldstein, attorneys for appellants.

Hall, White & Cate, attorneys for respondent.

(J. K.)

January 25, 1886.

Coram DORION, C. J., RAMSAY, CROSS, BABY, JJ.

LA BANQUE D'EPARGNES DE LA CITÉ ET DU DISTRICT DE MONTRÉAL
(*Defendant in Court below*),
APPELLANT;

AND

LA BANQUE JACQUES-CARTIER
(*Plaintiff in Court below*),
RESPONDENT.

Principal and Agent—Powers of Agent—Acquiescence and Ratification by Principal.

Appellant and respondent are banks,—the former a savings bank, and the latter an ordinary banking institution. On the 13th Sept., 1873, C., respondent's cashier, obtained a loan in his own name from appellant, on the security of shares of the respondent bank, standing also in his own name. These shares declining in value, C. substituted therefor notes the property of respondent, intimating that the loan was made to respondent, and not to himself personally. On the 23rd June, 1875, the transaction was entered on the books of respondent as being a transaction of respondent and not of C. personally, and on the 29th July, 1875, the pass-book between appellant and respondent was altered in accordance with the same pretension.

HELD:—That a principal may, by subsequent ratification, or even by tacit acquiescence, render himself responsible to a third party for the act of his agent in excess of his authority; and that in this case the respondent, being well aware of appellant's pretension, and having acquiesced in it until 5th August, 1876, and obtained further loans from the appellant, must be held to have ratified the act of its agent C., and became bound thereby.

The appeal was from a judgment of the Superior Court, Montreal (MATHIEU, J.), June 19, 1884, maintaining the respondent's action.

By an admission filed in the case, the question was restricted to the responsibility of the respondent for a loan of $25,000 obtained on the 13th Sept., 1873, by Cotté, cashier of respondent, from the appellant. The *considérants*

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of the judgment appealed from, upon this point, were as follows:—

"Considérant qu'il est bien établi dans cette cause que le prêt sus-mentionné du 13 septembre 1873 a été fait au dit Cotté personnellement, et que le produit du dit emprunt a été reçu par le dit Cotté personnellement et qu'il en a eu lui-même le bénéfice;

'Considérent que bien que le dit Cotté comme caissier de la demanderesse pût être autorisé à emprunter pour la demanderesse et à donner pour garantir les emprunts, les billets escomptés par la demanderesse, cependant il n'était pas autorisé à donner les billets escomptés par la dite demanderesse pour garantir son emprunt personnel à lui;

"Considérant que la dite défenderesse et le dit Edmond Julien Barbeau, son gérant, connaissaient la position du dit Cotté vis-à-vis de la demanderesse en cette cause;

"Considérant que le mandataire ou l'agent n'oblige son mandant que lorsqu'il agit [illegible] dans les limites de ses attributions, ou lorsqu'il [illegible] son personnel l'affaire du mandant et que le mandant a le bénéfice de la transaction et l'approuve;

"Considérant que le dit Cotté n'était pas autorisé comme sus-dit à donner à la défenderesse pour garantir son emprunt personnel à lui, les dits billets, et qu'en cela il a excédé son mandat, et que la demanderesse n'a pas non plus eu le bénéfice de la transaction du dit Cotté avec la défenderesse lors du dit emprunt;

"Considérant que les directeurs de la dite demanderesse et la dite demanderesse n'ont jamais approuvé formellement le transport des dits billets, fait par le dit Cotté et la dite défenderesse et qu'il n'est pas non plus légalement prouvé qu'ils aient connu ce dépôt et l'aient approuvé tacitement;

"Considérant qu'au contraire il est établi que les dits directeurs de la demanderesse ont répudié le dit emprunt du dit Cotté et le dépôt des dits billets promissoires, fait par le dit Cotté à la dite défenderesse, pour garantir son emprunt personnel comme sus-dit, et qu'ils ont répudié

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formellement la réclamation de la dite défenderesse à cet égard, etc."

A. Branchaud and *C. A. Geoffrion*, *Q. C.*, for appellant.

Hon. A. Lacoste, *Q. C.*, for respondent.

RAMSAY, J.:—

This is an important case, owing to its difficulty and also to its considerable pecuniary interest. The respondent sued the appellant on an account setting forth a variety of transactions, but the issues are now reduced to the consideration of one of them. The court is, moreover, discharged from entering into any consideration of the accounts, for it is agreed between the parties that if the appellant's tender is not sufficient, the judgment is to be confirmed as it stands. In other words, we are to adjudicate solely on the legal rights of the parties relative to this one transaction.

On the 13th September, 1873, the cashier of the Jacques Cartier Bank borrowed, in his own name, a sum of $25,000 from the appellant, on the security of five hundred shares of his bank, which stood in his own name. This loan was for three months, and when the amount became due, the cashier arranged that it should remain payable on demand. This state of things continued till the 22nd Feb., 1875, when the shares of the bank fell much in value, and the respondent notified the cashier that unless the amount was paid, or some other settlement come to, the shares would be sold. The cashier then saw the manager of the Savings Bank and told him that he was not the real debtor, that the shares were not his, but were held by him for the bank, as it was unlawful for the bank to hold its own shares, that he had borrowed for his bank, and that he would hand over as further security effects of the bank. This he did to the value of nearly $30,000. It appears that the manager of the Savings Bank took no steps to enquire further as to how this matter stood, taking the statement of the cashier as sufficient explanation of this exceptional transaction. This is, to some extent, explained by the great confidence the directors seem to have re-

posed in the cashier, and to the fact, necessarily known to the manager of the Savings Bank, that the cashier had actually borrowed for his bank, if not in an identical manner, at all events in a somewhat similar manner, nearly $500,000. Nevertheless, it is not susceptible of contradiction, that the $25,000 were paid to the cashier, and that they went into his private account at the bank, which was then overdrawn to the extent of $18,000, and that in no regular book of the bank did the transaction appear, as now represented; and there is no evidence to show that the cashier held the five hundred shares in trust for the bank. The manager of the Savings Bank offered to re-transfer these shares to the cashier, but he declined to take them then, and it seems they remained in the possession of the Savings Bank. On the 5th April, 1884, Mr. Barbeau tells us that they stood "au nom de la "Banque d'Epargnes, je crois, encore, mais à compte spé-"cial," p. 6. And, again, "Ces parts sont au nom de la "Banque d'Epargnes et *devront* être à l'ordre de la Banque "Jacques Cartier," p. 8. Of course, the last bit of this sentence covers the whole question. If the bank shares should be the property of the bank respondent, it would be no great effort to presume the rest of appellant's story. But the difficulty in appellant's way is to establish, by verbal evidence, a transaction which is totally at variance with the form of the transaction as it appears in the books of all the parties. Appellant's story is not impossible, and it may even be conceded that it is not improbable. The Savings Bank had no sufficient reason to act in bad faith in the matter, but it is evident that the burthen of proof is on appellant. It does not appear to me to be a question of the extent of the cashier's *mandat*, or of implied *mandat*, from the course of events, for the cashier did not act in the name of the bank. Mr. Judah, it is true, says positively in his evidence that the cashier saw him on the 13th September, 1873, and asked for $25,000 on the security of the 500 shares which stood in his name, but which were really the shares of the bank, which the cashier held because it was unlawful for the bank to buy

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in its own shares. Mr. Cotté, when first examined, does not remember to have seen Mr. Judah on the subject, but says :—" J'ai dû le mentionner à M. Barbeau ; mais je ne " sache pas que j'aie jamais fait de déclaration formelle à " cet effet," p. 36. Further on he says: " Après avoir " murement réfléchi, je déclare que j'ai mentionné à M. " Barbeau, le gérant de la Banque d'Epargnes, que l'em- " prunt que je faisais sur les dites parts était pour l'avan- " tage de La Banque Jacques Cartier, et lorsque La Banque " d'Epargnes m'a demandé des sûretés collatérales, j'ai fait " la même déclaration ; j'ai fait la même déclaration dans " les deux occasions au gérant de la Banque d'Epargnes." Turning to Mr. Barbeau's evidence, we find him saying in his examination-in-chief, " I always understood it to be a " special loan to the Jacques-Cartier Bank," p. 1. But in cross-examination he explains how little effect this general understanding amounted to. He says : " Sans cette décla- " ration formelle de la part de M. Honoré Cotté que c'était " pour La Banque que ce prêt avait été fait, *nous n'aurions* " *jamais songé à considérer cela comme une dette de la Banque* " *Jacques-Cartier*."

" Q. Jusqu'à cette époque-la, la Banque d'Epargnes avait " considéré ce prêt comme ayant été fait à M. Cotté per- " sonnellement ? "

" R. Oui, monsieur.

" Q. Et ce n'est que lors de cette déclaration de M. " Cotté, dans le mois de février, 1875, que la Banque " d'Epargnes a considéré ce prêt comme ayant été fait à " La Banque Jacques Cartier, par l'entremise de M. Cotté ?

" R. Precisément."

In addition to this, it seems that even in February, 1875, when Mr. Barbeau was fully aware of the contention of the cashier that he was a *prête-nom*, the books were not changed in the Savings Bank. On the 15th June, the Banque Jacques-Cartier closed its doors, and Mr. Barbeau became its manager, while he remained *gérant* of the Savings Bank. Then an operation was performed which, taken by itself, of course, cannot alter the rights of parties, but which, at all events, indicates what Mr. Barbeau

thought it desirable should be accepted as the position of the transaction. The entries in the books of the Savings Bank were altered for the current month of June, by transferring the credits arising from the notes paid and held as security for the $25,000 loan, from Mr. Cotté's account to that of the Jacques Cartier Bank. On the 19th of July, the whole account was transferred to the Jacques Cartier Bank. Doubtless, it may be said that Mr. Barbeau thought himself justified in this proceeding, because he had told the directors how the matter stood in presence of Mr. Cotté, and that they made no objection to considering it as a debt of the bank. I have no doubt as to Mr. Barbeau's veracity, but, taking his statement as it stands, I don't think it would bind the bank, even were it proved that the directors fully understood the import of the communication. On the contrary, those examined—five in number—either point blank deny that Mr. Barbeau had informed them of the case, or say they have no recollection of it. And Mr. Cotté, who must have desired a public recognition of the fact that he was acting for the bank in the matter, says nothing about it. Again we find no corresponding entries in the Jacques Cartier Bank books to correspond with the change in the books of the Savings Bank, except what was made by Mr. Barbeau, who represented a hostile interest, and there is no evidence that the attention of the directors was in any way called by Mr. Barbeau, or by any of the clerks under his control, to this entry of the 23rd June. It must be evident, I think, that no unauthorized act of Mr. Barbeau could alter the relations of the two banks while he represented both. I think, therefore, that while Mr. Barbeau was managing the Jacques Cartier Bank nothing has been proved to have taken place which could alter the original condition of the transaction, which on its face, was a loan to Mr. Cotté personally.

But the appellant has another line of defence which presents a question of greater delicacy, upon which the judgment of this Court definitively turns. The account was transferred in the books of the Jacques Cartier Bank

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on the 23rd June, 1875; at latest on the 29th July it was altered in the pass-book. In September, 1875, Mr. Barbeau ceased to have any authority in the Banque Jacques Cartier. Its affairs were in December transferred to a new, and it must be presumed, a vigorous administration, yet it was not till the 5th of August following, that they repudiated the debt entered on their books on the 23rd of June of the previous year. Admitting to the fullest extent, that Mr. Barbeau's position in the Banque Jacques Cartier, so long as he remained there, was a disturbing element in estimating the presumption of acquiescence in a transaction entirely in favor of the Banque Jacques Cartier, how can we account for the silence of the administration during more than nine months? It will be observed that their omission is not alone a failure to see an entry in the books, out of which the appellant is seeking to construct a title. This title is based on a fact—that the appellant lent $25,000 of his money on the absolute transfer of the securities of the Banque Jacques Cartier. We have thus the legal title of the appellant in possession and the reason of that title. Respondent answers: I was ignorant, not only of the entry of the 23rd June, but also of the fact that my treasure was over the way in the hands of my solvent neighbour until the 5th of August, 1876. As a matter of fact, this answer may be true, but the question we have to consider is whether the legal result of this is acquiescence in the transaction, as appellants contends it was, or not.

Several other minor matters have been adverted to which have not escaped our attention. One is that several of these notes given as security for the loan were renewed. This necessitated their withdrawal from the Savings Bank and the substitution of an equivalent. This seems very probable, and, if proved, it would strengthen the argument that the directors cannot be presumed to have been ignorant of all this movement. I confess, however, I have not been able to trace these renewals satisfactorily.

Again, it has been insisted on that after the directors should have known how the matter stood, and before they repudiated the entry of the 23rd June, 1875, they actually

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borrowed, that is to say, on the 3rd May, 1876, in much the same form as Mr. Cotté had done, a large sum from the Savings Bank. To the suspicious eye of wordly people the idea of an intentional reticence at once suggests itself. We, however, have to look further. The law does not permit Courts to presume fraud, and we must enquire whether this fact of the new loan, under the circumstances, has any significance. We think it has. It is not to be expected that the Court will believe that the directors of the Banque Jacques Cartier went to the Savings Bank to borrow a specified sum of money, without examining how they stood with the Savings Bank, and without examining their own treasure. The least examination of their own books, even of their pass-book with the Savings Bank book on the 3rd May, must have shown them the pretention of the appellant; a single sum of addition must have told them of the missing treasure.

There is only one other point. If the respondent's story be the correct one, Mr. Cotté feloniously made away with the funds of the Banque Jacques Cartier. Ten years have elapsed since Mr. Barbeau left the affairs of the Banque Jacques Cartier in other hands, and not a human being has ventured to whisper such an accusation. The Banque Jacques Cartier sued him for a general indebtedness, and he allowed the case to go by default, for some reason or other, possibly he had no evidence to disprove his own entries; but they never said what is now implied, and I venture to maintain that amidst all the agitation about bank mismanagement, raging for most of these ten years, no jury could have been induced to credit for an instant the explanations we are expected to adopt.

For all these reasons, while we readily admit to the fullest extent the principle invoked in the judgment of the Court below, we think it is not applicable to this case. We are, therefore, to reverse with costs. (1)

(1) NOTE.—Since pronouncing this opinion, my attention has been directed to the fact that there is no new loan by the Savings Bank. There is, however, no doubt as to the existence of a transaction on the 3rd May, 1876, and it seems to me to be indifferent whether it is called a new loan or a new arrangement as to part of a previous debt, which, technically, is not improperly styled a new debt: 1169 C. C.

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CROSS, J.:—

This action was brought by La Banque Jacques Cartier to recover from La Banque d'Epargnes a balance on securities deposited with and collected by them. The claim is made for $43,988.45. The Savings Bank admit $15,317.09, which they deposit and deny any further sum being due by them. La Banque Jacques Cartier contend that a loan of $25,000 charged to them was unauthorized. The controversy is entirely confined to the balance that would be due on this loan if authorized, and the parties have agreed to the exact amount to be awarded in case it should be decided that the Jacques Cartier Bank is liable for this loan. The Superior Court has given the Jacques Cartier Bank judgment, and the Savings Bank now appeal.

The circumstances appear to be as follows:—For several years previous to 1875 the Savings Bank were in the habit of making large deposits with the Jacques Cartier Bank, on which interest was allowed at rates agreed upon; these deposits on the 31st December, 1874, amounted to $500,000, and an increase was solicited by the Savings Bank.

On the 13th September, 1873, Honoré Cotté, being then cashier of La Banque Jacques Cartier, effected a loan for three months from the Savings Bank of $25,000, giving as security 500 shares of the stock of the Jacques Cartier Bank. The loan was paid to Cotté by two cheques, one on the Merchants Bank for $11,000, the other on the City Bank for $14,000; they were carried to the credit of Cotté in the books of the Jacques Cartier Bank, and covered an apparent overdraft in Cotté's account of $18,000. Although effected in Cotté's name, and the shares given in security transferred by Cotté personally, Judah, then president of the Savings Bank, Barbeau its manager, and Cotté the borrower, concur in their testimony that the loan was understood to be a loan to the Jacques Cartier Bank. When it fell due on the 13th December, it was arranged that it should remain as a loan on call at 8 per cent. interest.

On the 16th February, 1875, the deposit advances of the

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Savings Bank to the Jacques Cartier Bank being then in excess of $500,000, Cotté, on behalf of the latter bank, solicited a further advance of $143,000, which the Savings Bank consented to make, on condition that it and the previous deposits should be secured by the lodgment of customers' promissory notes, which the Jacques Cartier Bank transferred over as follows:—$500,228.70 on the 20th February, and $150,226.82 on the 22nd February, on which last date the value of the Jacques Cartier Bank shares having depreciated, Cotté was called upon to pay the balance of the $25,000 loan. He then formally repeated his declaration that the loan was for the Jacques Cartier Bank, they wished it continued, and that the shares should not be sacrificed; he undertook to secure the loan in the same manner as he had done the other loans. He consequently transferred to the Savings Bank the further amount of $29,325.21 in promissory notes, with the understanding that if the Savings Bank saw proper to insist on keeping the bank collections of all the notes then held by them, these latter should be applied first to the payment of the loan of $25,000. The Jacques Cartier Bank closed its doors on the 15th June, 1875, Cotté was dismissed and Barbeau appointed to investigate and make a report on the affairs of the institution and to act as general administrator. He accepted. He declares that soon afterwards he explained to the directors in the presence of Cotté the $25,000 transaction, and finding that it was not entered in the books of the Jacques Cartier Bank, he caused an entry to be made on the 23rd June in the journal, crediting the balance of the loan to the Savings Bank, then amounting to $23,961.14. An entry of it was also made in the pass book of the Jacques Cartier Bank with the Savings Bank by the employees of the Savings Bank, 19th July, 1875, to paid loan $23,961.14. On the 14th of August he made his statement and report of the affairs of the Jacques Cartier Bank, which assumed the $25,000 loan to be according to his view of the matter.

An election of directors took place in December, resulting in some change of the *personnel*. Mr. Beaudry was

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chosen president and appointed administrator, and on the 16th August, 1876, investigations having been made, the directors passed a resolution repudiating the loan of $25,000, of which notice was given to the Savings Bank. and the present action has been brought in consequence. Cotté, in his evidence, swears that the entire of the transactions above mentioned, including the loan of $25,000. were made for and in the interest of the Jacques Cartier Bank, that the money received went to the profit of the bank, and that the shares he gave as security were shares owned by the bank, which he had purchased with the knowledge and approbation of the directors to prevent the shares becoming depreciated.

Five of the directors have been examined. They deny having given Cotté authority to make the loan of $25,000, or to transfer to other banks any of the promissory notes held by the Jacques Cartier Bank, or that they had authorized the entries in the books acknowledging the loan, or that Cotté had informed them of the history of the $25,000 loan. Two of them, however, Lapierre and Galarneau, admit that they knew such notes had passed into the hands of others, and one of them, Galarneau, admits that Cotté was sometimes authorized to purchase shares of the bank from insolvent estates and to prevent their becoming depreciated. This witness, when asked if Cotté was not authorized to effect a loan in his own name, says he does not recollect, and in regard to Barbeau having informed them of the $25,000 loan, they say they do not recollect. One, however, Hudon, denies it positively, but he seems to refer to regular meetings of the directors. It is to be expected that after the failure of the bank, the directors would feel inclined to throw the blame on the cashier, while that officer would seek to excuse himself by showing that he had the concurrence of the directors in what he did.

It is very evident from the testimony of the directors themselves that Cotté was allowed to conduct the affairs of the bank much as he pleased, and had general control of its affairs. They all agree that they reposed the utmost

confidence in him; they adopted all his reports, and one of them, Lapierre, states that he even declared a dividend of 8 per cent. one month or two before the failure of the bank, showing that a matter of such vital importance was entirely left to him. It is besides apparent that the loans from the Savings Bank effected by him were numerous and to a large extent; and promissory notes of their customers are shown to have been transferred to other banks as well as the Savings Bank. These circumstances and the fact that the directors pretend that they did not know of the transfer of the customers' notes until after or about the time of the failure, show how utterly the directors abandoned all management and control to Cotté. In such essential matters which they ought to have known, and should themselves have controlled, it is no excuse to say that he acted without their authority, and the public, including the Savings Bank, had a right to assume that he had authority. Their own conduct seems to ratify the acts of Cotté, and to demonstrate their necessity, because in the face of the entries in the books they afterwards themselves resorted to the same source, the Savings Bank, to raise loans for the bank.

Coming now to the application of the evidence, if it be contended that the testimony of Judah, of Barbeau, and Cotté was inadmissible to charge the Jacques Cartier Bank with the personal debt of Cotté, it may be answered that the objection was not taken, but supposing it could be still raised by the Court, Cotté had undoubtedly power to borrow for the Jacques Cartier Bank, and to pledge its assets. Had he at the origin of the transaction in question, done so in the name of the bank, in place of in his own name, there would have been no doubt of the Jacques Cartier Bank being held for the loan. At the time the loan was called in he had the same power of borrowing for the Jacques Cartier Bank, and the Savings Bank were at that time in perfect security as regards this advance, because the stock remaining pledged to them was still at market rate sufficient to cover this loan. From this it is to be presumed that they, at least, were in perfect good faith in renewing

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the loan in favor of the Jacques Cartier Bank. That bank having an interest, and for its advantage chose, through Cotté, to say: Don't sell the shares, we adopt the loan, it is ours, and here is security to make you safe. But although empowered to borrow for and in the name of the bank, it may be said, it is not to be presumed that Cotté could do so from his own personal creditor to pay his own personal debt, unless the proof justified such an inference. This proof I think, results from, 1st. The delivery over of the assets of the Jacques Cartier Bank to cover the loan. 2nd. From the entries made in the books as well of the Jacques Cartier Bank as of the Savings Bank, acknowledging the liability. 3rd. From the silence and consequent acquiescence of the Jacques Cartier Bank to such disposal of its assets, and to these acknowledgments for a period of fifteen months without objection. These acts, although performed by the cashier, must be presumed to be the acts of the Directors. He was their servant and deputy, and the acts were of that vital and important nature that the Directors were bound to know, and they cannot excuse themselves by pretended ignorance. As to the acknowledgments by the entries in the books, Barbeau was at the time they were made administrator of the affairs of the Jacques Cartier Bank, and as such had power to make such acknowledgments, provided it was done without fraud; he was not acting personally or for himself, but in his capacity as administrator of the Jacques Cartier Bank. The report made by him to the Directors of their affairs, and his conduct were approved of by the Directors, and reasonably bound the Jacques Cartier Bank. No presumption of fraud arises in regard to his acts, they are in perfect accord with the evidence of Judah, Barbeau and Cotté, as to the origin of the transaction. This tacit sanction of the Directors with their presumed knowledge of the disposal of the assets and the state of the accounts lasted for fifteen months, and would, in all probability, have continued but for the election of new Directors, who promoted a different policy. Their resolution to repudiate came too late, and could not impair the evident under-

standing of their predecessors as to the state of the accounts and the way the transaction had been viewed up to the time of the reversal of the course previously approved of.

DORION, C. J.:—

I have only a word to add. Without doubt, the case is a very difficult one, but the whole question comes to this: Is it proved that this transaction was for the Banque Jacques Cartier and not for Cotté? Mr. Judah, the President of the Savings Bank, says it was understood it was a transaction for the Jacques Cartier Bank, and not for Mr. Cotté. Mr. Barbeau, the manager of the Savings Bank, also understood that the loan was for the Jacques Cartier Bank. If there is *commencement de preuve par écrit* existing to make this evidence admissible, then there can be no doubt that it is clearly established that the transaction was for the Banque Jacques Cartier, and that it profited thereby. Is there a *commencement de preuve?* I find it in this: Mr. Barbeau says he caused an entry to be made in the books of the Banque Jacques Cartier, showing the transaction to be for the bank, and communicated it to the directors, and we find an entry in the books of this very transaction. This entry was not repudiated for fifteen months afterwards. This was a sufficient *commencement de preuve.* Upon this we have the evidence of Messrs. Judah, Cotté and Barbeau, which is clear and sufficient to establish that the transaction was not with Cotté personally, but with the Banque Jacques Cartier.

The judgment of the Court is as follows:—

" Considering that on the 13th of September, 1873, the appellant lent to Honoré Cotté, *gérant* of La Banque Jacques Cartier, in his own name, the sum of $25,000 on the security of 500 shares of the said bank standing in the name of the said Honoré Cotté; and considering that, the value of the said shares became depreciated, and that on the demand of the appellant, the said Honoré Cotté substituted notes, the property of the said Banque Jacques Cartier, as security for the said loan, then intimating to

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the said appellant that the loan was made to the Banque Jacques Cartier for which he was acting, and not to him personally;

"Considering that the transaction was subsequently entered on the books of the Banque Jacques Cartier, to wit, on the 23rd June, 1875, as being a transaction of the said Banque Jacques Cartier and not of the said Honoré Cotté personally, and considering further that the pass-book of the said Banque Jacques Cartier with the said bank appellant was also altered on or about the 29th July, 1875, in accordance with the pretension that the said Banque Jacques Cartier and not the said Honoré Cotté was the real debtor of the said sum of $25,000;

"And considering that the said Banque Jacques Cartier, although well aware of the said pretension of the said bank appellant, carried on business with the said bank for more than twelve months, and notably on the 3rd of May, 1876, borrowed from the said bank appellant a large sum of money without in any way repudiating or putting in question the pretension of the said bank appellant as to its indebtedness for the said sum of $25,000;

"And considering that the said Banque Jacques Cartier acquiesced in the pretension of the said bank appellant, and did not repudiate the same until the 5th of August, 1876;

"And considering that by such acquiescence the said Banque Jacques Cartier confirms the evidence adduced to establish that the said Honoré Cotté, in borrowing the said sum of $25,000, acted for the said bank and not for himself personally;

"Considering that although the agent does not bind his principal beyond the limit of his authority, and although it is not to be presumed that it is within the authority of the agent to bind the principal for the personal interest of the agent, the principal may, by subsequent ratification, or even by tacit acquiescence, render himself responsible to a third party for the act of his agent, irrespective of any consideration of the relative rights of the principal and agent between themselves;

" And considering there is error in the judgment appealed from, to wit, the judgment rendered by the Superior Court at Montreal on the 17th of June, 1884, doth annul and reverse the same, and proceeding to render the judgment which the Court below ought to have rendered ;

" Seeing the admissions filed by the parties on the 3rd of June, 1884,

" Doth declare and adjudge good, valid and sufficient the tender, deposit and payment into Court made by the said bank appellant (defendant below), simultaneously with the filing of its plea, of the sum of $15,317.09, and of a further sum of $284.50 for the interest accrued thereon from the 19th July, 1877 (date of service of summons), to the 9th November, 1877, date of said deposit and payment into Court, and of a further sum of $54.15 for the costs of suit then accrued, forming altogether a total sum of $15,655.74, of which deposit and payment into Court, the Court now here doth hereby give *acte* to the said bank appellant;

" And the Court now here doth dismiss the action of the respondent (plaintiff below) for the excess of its said demand beyond the amount so tendered and paid into Court, with costs of the contestation in the Court below from the date of said deposit and payment into Court ;

" And it is ordered that the said respondent do pay to the said appellant the costs incurred in the Court of Appeal."

Judgment reversed.

A. Branchaud, attorney for appellant.

Lacoste, Globensky, Bisaillon & Brosseau, attorneys for respondents.

(J K.)

January 21, 1888

Coram DORION, C.J., RAMSAY, TESSIER, CROSS, F[illegible], JJ.

DAME JANE BELL
(*Defendant in Court below*),
APPELLANT;

AND

JAMES COURT ès-qualité
(*Plaintiff in Court below*),
RESPONDENT;

AND

JOHN MACINTOSH,
RESPONDENT *par reprise d'instance.*

Lessor and lessee—Interruption of lessee's enjoyment—Compensation—Damages.

HELD:—1. Where a lessee was entitled by a clause of the lease, to become proprietor of the premises leased on payment of a specified sum, that when sued in ejectment he could not plead that this sum had been compensated by damages suffered by him through the interruption of his business.

2. In any case the damages which a tenant can claim for non fulfilment of a condition of the lease must be the immediate and direct consequence of such inexecution, and will not include indirect losses, *e. g.* damages alleged to have been suffered owing to the lessee's inability to fulfil contracts, or for waste of wood prepared for his business.

The judgment appealed from was rendered by the Superior Court, Montreal, (JETTÉ, J.), March 4, 1882, as follows:—

"La Cour, etc.....

"Attendu que le demandeur en sa qualité de syndic à la faillite de la banque connue sous le nom de la 'Mechanics' Bank,' poursuit la défenderesse en expulsion d'une certaine manufacture de bobines, appelée 'The Calumet Spool Factory,' et des machines, chaudières et ustensiles servant à l'exploitation de la dite manufacture, le tout décrit comme suit, etc., au bail de la dite manu-

facture, etc., consenti le trois mars 1879, par Menzies, caissier de la dite banque faillie, en son nom personnel, mais en réalité pour la banque, ainsi que reconnu par transport de Menzies au demandeur ès-qualité, en date du 28 février 1881, le demandeur alléguant que ce bail avait été fait pour deux ans, que ce terme est expiré et que la défenderesse refuse néanmoins de remettre la possession de la dite manufacture et objets y compris ;

"Attendu que la défenderesse a plaidé à cette action disant en substance :

"Que par le bail invoqué il était stipulé que moyennant le paiement par la défenderesse à la banque d'une somme de $2,500 dans le cours de deux années de location susdite, la défenderesse deviendrait propriétaire de la manufacture et des objets loués ;

"Qu'il avait été convenu en outre que Menzies, agissant comme susdit, garantissait à la défenderesse la possession des objets loués ; que sur la foi de cette garantie et de la stipulation constatée par ce bail, la défenderesse aurait fait ensuite de grandes dépenses par l'achat de machines nouvelles pour mettre la manufacture louée en état de rapporter beaucoup, et aurait obtenu des contrats importants pour la fabrication de grandes quantités de bobines pour le fil, lesquels devaient lui rapporter des profits considérables, si elle avait été maintenue en possession des choses louées ; mais que peu de temps après ce bail, savoir le 15 mars 1879, un nommé Scott qui avait eu un intérêt dans cette manufacture, mais l'avait cédé à la banque, ayant fait faillite, son syndic se serait emparé de la dite manufacture et en aurait expulsé et dépossédé la défenderesse, malgré ses résistances et protestations ;

"Que sur ce, la défenderesse aurait requis Menzies de faire cesser ce trouble et de la remettre en possession, ou de l'autoriser à se remettre en possession, et de la garantir contre tous procédés pouvant être pris contre elle ou ses agents, ce dont Menzies serait convenu, autorisant Thompson, mari de la défenderesse, à reprendre possession et s'obligeant à l'y maintenir et à le défendre ;

"Que pour arriver à cette reprise de possession, le dit

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Thompson aurait eu à subir des tracasseries fort désagréables, aurait été arrêté et mis en accusation devant la justice criminelle ;

"Que cette dépossession, ces procès et ces troubles ont eu pour résultat de faire à la défenderesse des frais considérables, de l'empêcher d'exploiter la manufacture en question pendant une période d'au moins 39 jours, savoir 25 jours du 15 mars, date de la prise de possession par le syndic provisoire à la faillite de Scott, au 8 avril, date de la remise des lieux par le syndic définitif de Scott, à la défenderesse, et 14 jours additionnels pendant lesquels il a fallu réparer les machines endommagées par la gelée et remettre la dite manufacture en état de fonctionner ; de l'empêcher de remplir les contrats qu'elle avait faits et par suite de la priver des profits qu'elle aurait réalisés, lesquels dommages, frais, dépenses et pertes de profits s'élèvent en tout à la somme de $18,804.20, dont la banque représentée par le demandeur ès-qualité est responsable envers elle ;

"Qu'en conséquence la somme de $2,500 qu'elle devait payer à la banque pour devenir propriétaire est plus que payée et compensée, et que la défenderesse a droit de garder la dite manufacture et les machines qui en dépendent ; dont la demanderesse est mal fondée à demander la possession ;

"Attendu que par sa réponse à ces moyens de défense le demandeur ès-qualité, tout en niant les faits et la réclamation alléguée par la défenderesse, a néanmoins déclaré qu'il était prêt à abandonner à la dite défenderesse en règlement de ses prétendus dommages, la somme de $500 que la défenderesse devait pour les deux années de loyer de la dite manufacture et machines ;

"Attendu qu'il est établi en preuve que la défenderesse a de fait été injustement dépossédée pendant la période alléguée, de la jouissance de la dite manufacture et qu'il lui en est résulté de grands troubles et dommages ;

"Considérant qu'à raison des conventions et stipulations intervenues entre la défenderesse et la banque fail-

lie, dont le demandeur ès-qualité est le syndic, la dite défenderesse est bien fondée à lui imputer la responsabilité des dommages par elle soufferts ;

" Considérant néanmoins que les dommages que la défenderesse pourrait avoir droit de recouvrer de la dite banque, ne peuvent être que ceux résultant directement et nécessairement des faits dont celle-ci est responsable et qui sont une suite directe et immédiate de ces faits ;

" Vu l'article 1075 du Code Civil ;.

" Considérant quant aux dommages réclamés à raison des gages payés et de la pension fournie aux employés pendant la suspension des opérations de la défenderesse, des frais par elle encourus et autres dépenses, que la défenderesse n'a prouvé que les items 1, 2, 4, 5, 6, 7, 8, 9, 11, 14, 15, 16, 17, 19, 20, 21, 22 et 23 de la première page de son compte et ce, jusqu'à concurrence de $760.96 seulement ; les items 16 et 21 n'étant prouvés que pour partie, et les items 3, 10, 12, 13, 18, 24, 25, 26 et 27 étant rejetés—1. Vu la preuve faite que Beattie (item 3ème) ne recevait pas de salaire de la défenderesse ; 2. Parce que le compte de Burroughs, du greffier et de l'huissier de Lachute (items 10, 12 et 13) sont pour des poursuites non autorisées par la banque et dont elle n'est pas responsable : et 3. Vu l'absence totale de preuve quant aux autres items (18, 24, 25, 26 et 27) ;

" Considérant, quant aux dommages réclamés à raison de l'exécution des contrats faits par la défenderesse pour la fabrication de quantités considérables de bobines et sur lesquels elle devait réaliser de grands profits, que la banque ne pourrait être responsable de cette perte que dans le cas où la suspension des opérations de la manufacture, par suite des faits susdits, aurait empêché la défenderesse soit d'exécuter les commandes à elle faites, dans le temps fixé par ses contrats, soit de se procurer le bois requis en temps utile et à des prix raisonnables, de manière à rendre impossible l'exécution des dits contrats ;

" Considérant, quant à la première hypothèse, qu'il n'a pas été prouvé qu'aucun terme eût été fixé pour l'exécution des dits marchés et que rien ne démontre que les dits

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contrats n'auraient pas pu être remplis après la reprise de possession de la manufacture par la défenderesse;

"Considérant, quant à la seconde hypothèse, que bien que la défenderesse ait tenté de prouver que la saisie de la manufacture a eu pour effet de l'empêcher de se procurer le bois nécessaire, en temps utile, il est établi, au contraire, qu'elle aurait pu se procurer ce bois, en n'importe quel temps de l'année et que, de fait, la dite manufacture a été en opération jusqu'à la fin de l'été, recevant, par conséquent, le bois nécessaire pendant tout ce temps; enfin qu'il n'est pas établi que le prix du bois aurait été plus élevé après la reprise de possession qu'avant ou pendant la dépossession;

"Considérant, en conséquence, que l'inexécution des contrats allégués par la défenderesse ne peut être imputée au fait de la banque et n'est pas une suite immédiate et directe du fait générateur de la responsabilité de celle-ci;

"Considérant, quant aux dommages pour perte de bois gâté, qu'aucune preuve n'en a été faite;

"Considérant enfin, quant à la perte des profits que la défenderesse aurait pu faire par l'exploitation de la dite manufacture pendant la période de dépossession d'icelle, que la réclamation de la défenderesse est établie et prouvée, mais jusqu'à concurrence de $585 seulement, savoir à raison de $15 par jour pendant 39 jours;

"Considérant, qu'il résulte de ce que dessus que la totalité des dommages établis par la défenderesse ne s'élève, par la réunion des deux sommes susdites, qu'à celle de $1,345.96, laquelle est insuffisante pour compenser et éteindre celle de $2,500 que la défenderesse devait payer à la banque pour devenir propriétaire de la manufacture et des machines sus-mentionnées;

"Considérant, en conséquence, que la défenderesse n'ayant pas fait le paiement convenu, elle n'est pas devenue propriétaire des choses louées et n'a aucun droit de les retenir après le terme de son bail;

"Considérant, quant à la compensation des dommages allégués par la défenderesse que le syndic offre de faire, au moyen des loyers dûs par la dite défenderesse jusqu'à

concurrence de $500, qu'il n'y a pas lieu quant à présent, d'adjuger sur cet incident de la cause, attendu qu'aucune condamnation n'est prononcée en faveur de la défenderesse ;

" Considérant en outre, que le simple protêt de la défenderesse contre la juridiction de cette Cour, sans exception formelle à cette fin, est incompatible avec son acceptation de cette même juridiction par sa défense et ses procédures et, par suite, ne peut être pris en considération ;

" Renvoie les exceptions et défenses de la défenderesse et la condamne à livrer au demandeur ès-qualité, sous trois jours de ce jugement, la possession des bâtisses, manufacture, machines et ustensiles et aussi du terrain ci-dessus décrits, et sera la dite livraison par toutes voiés et moyens que de droit, le tout avec dépens distraits, etc."

T. P. Butler for appellant.

S. P. Leet and *Hon. R. Laflamme, Q.C.*, for respondent.

CROSS, J. :—

This action was brought by James Court as liquidator of the Mechanics Bank, who, being now deceased, is represented by Macintosh *reprenant l'instance*. Its object was to expel the appellant, Dame Jane Bell, wife of Stephen J. Thompson, from the occupation of a spool factory with certain moveable machinery and appurtenances, situate at Grenville, in the county of Argenteuil, the cause of expulsion being stated to be the expiry of the lease under which the property was held by Mrs. Thompson, and the non-payment of the rent of $250 per annum stipulated to be paid by her. The lease was executed before Phillips, notary, on the 4th of March, 1879, and provided that the lessee had the option of purchase of the property for the sum of $2,500 if exercised during its pendency. The lessor was one John H. Menzies, at the time cashier of the Mechanics Bank. After that institution had gone into liquidation, Menzies, on the 28th February, 1881, assigned the lease to James Court in his quality of liquidator, the said Menzies declaring that in the matter he had acted for and in the interest of the Mechanics Bank.

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The transfer was signified 8th March, 1881, and a notarial demand for possession of the property made upon the appellant by the liquidator. The appellant defended the suit on grounds to be hereafter mentioned. The Superior Court gave judgment ordering the expulsion, and from this judgment the present appeal has been taken.

By her plea Mrs. Thompson protested that the Superior Court at Montreal had no jurisdiction in the case, but as there had been no preliminary plea to the jurisdiction, and the Superior Court having clearly jurisdiction over the subject matter, the question of locality of the suit could not be raised in the absence of the proper plea; the mere protest had therefore to be disregarded.

The plea to the merits is to the effect that one Thomas Scott, as well as the now appellants, had each the ownership of portions of the moveable effects; that Scott had raised money from the Mechanics Bank to the extent of $2,500 by giving a bill of sale of certain of the moveables and machinery at the spool factory to Menzies; that Scott included in this sale a great part of the moveables which belonged to the appellant; that an understanding was come to, that the appellant should assume Scott's liability and acquire the whole property, in pursuance of which to secure the bank she made a nominal sale of her interests to Menzies, valued at $4,419, for the sum of $2,500, that it was really not a sale but only a pledge of the property, but that in virtue of the lease Menzies was bound to maintain her in the possession and enjoyment of the property, and protect her from evictions; that Scott, having been put into the Insolvent Court, his assignee, on the 15th March, 1879, some twelve days after the execution of the lease, took possession of the factory and prevented Mrs. Thompson from having the use of it for thirty-nine days; that she called upon Menzies to restore her possession, and he promised to do so, but failed to keep his promise; that she had gone to great expense in procuring additional machinery, making repairs and alterations and contracting for and procuring a supply of

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suitable wood for making spools, all of which went to waste and became useless by the interruption caused to her business; the machinery became rusted and out of repair, and she lost the benefit of large contracts for the manufacture of spools, which would have brought her great profits, in consequence of all which she suffered damage to the extent of $18,804.20, which being largely in excess of the $2,500 stipulated as the price to be paid for the property, she had a right to have her damages liquidated and set off in compensation of the $2,500, and to have the respondent's action dismissed.

It is to be observed that the appellant makes no pretension to claim that she would have a right to retain the property until her damages were paid; her only conclusion is for the dismissal of the action, and had means been taken to determine whether the damages were of such a nature as could be set up in answer to a demand in expulsion, the enormous labor of an *enquête* covering 323 printed pages could have been saved to all the parties having to do with this affair.

To begin with these damages, they are not, in my opinion, of a nature entitling the appellant claimant to set them up in a demand against her for expulsion.

Again, for the cessation of the use of the factory for twenty-three days, admitting that the lessor was responsible for the encroachment, which I think doubtful, a claim for $18,804.20 has the appearance of absurdity. The lessor could only have been responsible for damages that could have been foreseen, certainly not for the appellant's contracts or his wood going to waste; and if this had been duly considered the building up of proceedings which come before us in the shape of two factums, containing 396 pages of printing, might have been avoided with the consequent cost.

But, overlooking the fact that unliquidated damages of this nature could not be considered as a payment of the specific price for which the appellant had an option of purchase, and conceding that they might be liquidated to operate a set off to the price when their amount should

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be ascertained, the issue still remained as to whether they were really suffered to an amount equal to the price to have been paid for the property. The judge of the court below has gone very carefully into this enquiry, and to my mind has made a very liberal allowance for any damages legally claimable. He makes the whole amount to $1,345.96, whereof $585 are for thirty-nine days of the deprivation of the use of the factory at $15 per day—I think a decided overestimate, which sum of $1345.96 being insufficient to cover the price of $2,500 to be paid for the property, the prayer of the appellant for the dismissal of respondent's action obviously could not be granted, and respondent's demand for expulsion had of necessity to be allowed. The appellant, besides, owed two years' rent, equal to $500, which the respondent offered to abandon for damages, and I think the judge made an overestimate of the time the factory was closed; excluding Sundays, I should think it did not exceed 23 days. The claim of Scott's assignee was wholly unfounded. Scott had sold out his interest to Menzies. It is true that the appellant is not shut out of her recourse in an action of damages, or she might even raise her pretension that the property was only pledged, but it would be well for her to reflect whether she could prove anything like the amount the judge of the Superior Court was disposed to allow her, and whether there is a responsible party liable for the damages. As the matter at present stands, the judgment appealed from must be confirmed.

Judgment confirmed.

T. P. Butler, attorney for appellant.

Maclaren, Leet, Smith & Rogers, attorneys for respondent.

(J. K.)

22 mars 1886.

Coram DORION, J. en C., MONK, RAMSAY, CROSS, BABY, JJ.

LA COMPAGNIE D'ASSURANCE MUTUELLE CONTRE LE FEU DE LA CITÉ DE MONTRÉAL,

(*Défenderesse en Cour inférieure*),

APPELANTE ;

ET

DAME VILLENEUVE ET VIR,

(*Demandeurs en Cour inférieure*),

INTIMÉS.

Grevé de substitution—Possession—Assurance—Déclaration—Arbitrage—Renonciation tacite.

JUGÉ :—1o. Qu'un grevé de substitution possède à titre de propriétaire et peut comme tel faire assurer la propriété qu'il possède ; et que la déclaration qu'il aurait pu faire à la compagnie d'assurance avant d'effectuer son contrat, qu'il était propriétaire, n'est pas une fausse déclaration.

2o. Que lorsque une compagnie d'assurance assure une maison, une cuisine d'été et un hangar avec tout le ménage "*contenu dans la dite maison*," et lorsqu'il y a des meubles qui de leur nature doivent se trouver dans le hangar v. g. le charbon, l'assurance couvre tous les meubles de l'assuré, même ceux qui étaient dans la maison et qui auraient été transportés dans la cuisine d'été ou le hangar.

3o. Que lorsqu'une compagnie d'assurance consent à un arbitrage pour faire déterminer le montant des dommages soufferts par l'assuré, elle renonce par là même à son droit d'invoquer toute cause de déchéance connue par elle avant la nomination des arbitres.

Le jugement suivant rendu par la Cour Supérieure (MATHIEU, J., 16 décembre 1884), contient tous les faits de la cause, et les fait ressortir suffisamment :

" La Cour, etc.

" Attendu que le 5 octobre 1883, la demanderesse agissant par son époux, Tancrède Jobin, s'adressa au secrétaire de la défenderesse pour faire assurer contre le feu pour trois ans, sa maison, une cuisine d'été y attenante et un hangar érigés sur un immeuble qui lui appartenait

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comme grevée de substitution, et son ménage ; que la demanderesse, par Jobin, son dit époux, signa une demande d'assurance *en blanc*, la date seulement " 5 octobre 1883 " étant remplie, et laissa ce blanc de demande au secrétaire de la défenderesse qui lui remit *un blanc* de billet de dépôt, pour le faire signer par la demanderesse ; que le lendemain, 6 octobre, Jobin rapporta le billet de dépôt, signé par la demanderesse, et indiqua verbalement au secrétaire de la défenderesse, le montant pour lequel il désirait obtenir une assurance comme suit :

1o. La maison, résidence de l'assurée 166 Rue Drolet, Montréal	$1400 00
2o. La cuisine d'été	60 00
3o. Le hangar	60 00
4o. Les meubles de ménage, hardes et linges	2000 00
Total,	$3520 00

Qu'il ne fut pas question de la bâtisse où se trouvaient les meubles de ménage, hardes et linges, que le secrétaire de la défenderesse prit note des détails, calcula la valeur du risque et fixa le montant du billet de dépôt à $174, remplit le billet de ce chiffre, et déclara à Jobin que la prime à payer était de $8.68 moins le bonus de $4.34, laissant une balance de $4.34 que Jobin paya alors, laissant entre les mains du secrétaire de la défenderesse la demande d'assurance *en blanc*, sauf les mots et chiffres, " $3520 ; $174 ; $8.68 ; bonus, $4.34 ; balance, $4.34," qui furent alors écrits par le secrétaire de la défenderesse, en présence de Jobin ; que le 9 novembre 1883, le feu détruisit et endommagea : 1o. Les immeubles ainsi assurés au montant de $270.00. 2o. Les biens meubles se trouvant partie dans la maison, partie dans la cuisine, et partie dans le hangar, au montant de $799.75, formant la somme totale de $1,069.75.

Que lors de cet incendie la demande d'assurance n'était pas encore remplie, et la police n'était pas préparée ; qu'après avoir reçu avis de cet incendie par la demanderesse qui parait avoir rempli toutes les formalités exigées pour faire connaître cet incendie à la défenderesse, cette dernière, par ses officiers, remplit, le 19 novembre 1883, la demande d'assurance dans les termes

suivants, quant aux meubles; '4o. meubles de ménage, hardes et linges, miroirs, horloges, argenterie, vaisselle, verrerie, livres imprimées, cadres et gravures, provisions de bouche, bois de chauffage et charbon, $1,540 ; sur un piano, $400, et sur une machine à coudre $60, le tout, la propriété de l'assurée et contenu dans la dite maison ; que la police d'assurance, qui est datée du 5 octobre 1883, mais qui parait avoir été antidatée et qui n'a été préparée et transmise à la demanderesse que le 19 novembre 1883, contient aussi la description suivante des meubles assurés ; " 4o. sur meubles de ménage, hardes et linge, miroirs, horloges, argenterie, vaisselle, verrerie, livres imprimés, cadres et gravures, provisions de bouche, bois de chauffage et charbon, $1540, sur un piano, $400, sur une machine à coudre $60, le tout la propriété de l'assurée *et contenu dans la dite maison*' ; que les mots, '*et contenu dans la dite maison*' qui ont été mis dans la demande d'assurance et dans la police y ont été insérés par les employés de la défenderesse hors la connaissance et sans le consentement de la demanderesse ; que lors du dit incendie, comme lors de la dite assurance, il y avait dans la cuisine d'été et dans le hangar du linge et des effets mobiliers au montant de $709.50; que les parties nommèrent des arbitres qui évaluèrent les dommages causés à la maison à $150, à la cuisine d'été à $60.00, et au hangar à $60.00, et aux meubles à $799.50 ;

" Attendu que le 19 novembre 1883 le secrétaire de la défenderesse, en transmettant à la demanderesse la police d'assurance en question, lui a offert de lui payer la somme de $332.25, montant qu'il considérait alors être le seul qui fut couvert par la dite assurance ;

" Attendu que le 11 janvier 1884, par le ministère de Mtre Morin, notaire, la dite défenderesse aurait déclaré à la demanderesse que sans aucunement reconnaître ni admettre les chiffres de la réclamation de la demanderesse, elle était disposée à lui offrir une somme de $720, pour parfait acquit de sa réclamation, laquelle somme elle lui offrit à deniers découverts, ce que la demanderesse refusa d'accepter ;

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" Attendu que le 6 janvier dernier la demanderesse poursuivit la défenderesse, réclamant d'elle la dite somme de $1,069.75, et alléguant, dans sa déclaration, les faits ci-dessus mentionnés, et de plus, que les biens meubles étaient assurés tels que contenus soit dans la dite maison, soit dans les autres bâtiments assurés, conformément aux conditions ordinaires de la défenderesse, telles qu'écrites sur le dos de ses polices d'assurance, et extraites de sa charte et ses règlements ;

" Attendu que le 1er mars dernier la défenderesse a plaidé à l'action de la demanderesse, et qu'elle alléguait dans une première exception, que parmi les objets ainsi assurés se trouvaient quatre valises et un baril contenant des hardes et du linge et divers objets mobiliers qui auraient été endommagés pour une somme de $675.55 que réclame la demanderesse et qui, au moment de l'incendie, ne se trouvaient pas dans la maison assurée, mais dans une petite construction en bois, en dehors de la dite maison, et servant de cuisine d'été ; que lors de la dite assurance la défenderesse ignorait que la demanderesse gardait des hardes et du linge de grande valeur dans cette cuisine d'été, et qu'il ne fut pas alors déclaré par la demanderesse qu'une partie notable des meubles offerts à assurer ne se trouvait pas dans la maison ; que si la défenderesse eût connu ce fait, elle aurait refusé d'effectuer la dite assurance ou, à tout événement, elle ne l'aurait fait qu'à un taux beaucoup plus élevé et justifié par de plus grands risques résultant de l'état des lieux à cette époque, et qu'en conséquence la dite assurance est nulle, par suite des fausses représentations et réticences de la demanderesse ; que lors de la dite assurance la demanderesse ne déclarant pas le lieu où étaient les dits objets, la défenderesse crut naturellement qu'ils étaient dans la maison, vu que dans le cours ordinaire des choses, des objets de cette nature ne se trouvent pas dans une cuisine, qu'elle les assura comme tels, et chargea à la demanderesse le taux d'assurance fixé par l'usage et les règlements pour tels cas ; qu'il était du devoir de la demanderesse de déclarer toutes les circonstances qui pouvaient affecter l'apprécia-

tion du risque que la demanderesse proposait à la défenderesse d'assurer; qu'il résulte de ce que dessus que la demanderesse ne peut réclamer les dommages causés aux dits effets et objets qui ont été estimés à la somme de $675.55, non plus qu'une autre somme de $33.95, pour certains meubles endommagés dans le hangar et qui n'ont pas été couverts par la dite assurance, vu qu'ils n'ont pas été déclarés alors; que la seule somme qui soit due en vertu de la dite assurance est celle de $360.25, savoir $270, pour dommages à la maison, $90.25 pour dommages causés aux meubles de la maison, et conclut en demandant acte du dépôt et de la consignation qu'elle fait de la dite somme de $360.25, et que l'action de la demanderesse soit renvoyée avec dépens;

" Attendu que par une autre exception, la défenderesse alléguait que lorsque la dite assurance a été effectuée les quatre valises et le baril en question avec leur contenu se trouvaient dans la maison assurée et non dans la cuisine d'été, et qu'ils n'ont été transportés dans ce dernier endroit qu'après le 5 octobre sans avis à la défenderesse, ce qui mit fin au contrat d'assurance des dits objets;

" Attendu que par une troisième exception péremptoire, la défenderesse allégua que la demande d'assurance ne fut pas rempli et la police préparée avant le dit incendie, parce que les officiers étaient alors surchargés d'ouvrage, que le 18 novembre 1883, le dit Tancrède Jobin vint avertir la défenderesse du dit incendie, et qu'en réponse aux questions posées par les officiers de la défenderesse, il leur déclara que le ménage était assuré pour $2000, mais ne dit pas alors où se trouvait ce ménage lors de l'incendie; que le même jour les officiers de la défenderesse se transportèrent sur les lieux incendiés, et que c'est alors que pour la première fois la défenderesse constata qu'une quantité considérable de hardes et linge se trouvait dans la cuisine, et quelques uns dans le hangar; que subséquemment, et en conformité à la loi et aux règlements de la défenderesse, des arbitres furent nommés par les parties pour estimer les dommages causés par le dit incendie; mais que la défenderesse s'objecta à ce qu'ils estimassent

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les dommages causés aux hardes et linges trouvés dans la dite cuisine et dans le dit hangar, en autant qu'ils n'avaient pas été assurés ;

" Attendu que le 18 avril dernier, la défenderesse produisit avec la permission de la cour une autre exception péremptoire alléguant que la demanderesse avait déclaré dans la demande d'assurance du 5 octobre 1883, qu'elle était propriétaire de l'immeuble qu'elle demandait à assurer, mais que cette déclaration était fausse en autant qu'elle n'était pas propriétaire mais qu'elle n'en jouissait qu'à titre de grevée de substitution ; qu'en vertu de la loi et règlements de la défenderesse imprimés au dos des polices, toute personne demandant à effectuer une assurance doit déclarer en quelle qualité elle fait cette demande, et que toute fausse déclaration à cet égard rend nulle la police ;

" Attendu que par jugement de cette cour du 16 avril dernier, il fut permis à la défenderesse d'amender ses exceptions en premier, deuxième et troisième lieu produites. en ajoutant à ses conclusions que la somme par elle déposée de $360.25, ne soit payée à la demanderesse que dans le cas où le plaidoyer supplémentaire ci-dessus mentionné serait renvoyé ;

" Attendu que le 5 octobre 1883, la dite défenderesse par le ministère de son secrétaire a donné à la demanderesse un reçu constatant que la dite demanderesse avait remis ce jour là à la dite défenderesse son billet pour la somme de $174, et qu'elle avait payée la somme de $8.68 pour l'entrée sur l'assurance qu'elle avait effectuée à la dite compagnie au montant de $3,520 pour trois années, à compter de cette date là sur propriétés décrites dans sa demande en date du dit jour et qui devait être complété par la police ;

" Attendu que ce n'est que 19 novembre 1883, que la défenderesse a transmis à la demanderesse la police d'assurance dont il est question en cette cause, et que le 22 novembre 1883, la demanderesse après avoir examiné la dite police a, par une lettre de cette dernière date, protesté contre l'insertion des mots " *contenus dans la dite maison* "

qui se lisent dans la dite police, et a renvoyé cette police au secrétaire de la compagnie défenderesse, lui demandant de corriger cette erreur ;

" Attendu que la défenderesse a été organisée sous les dispositions générales du chapitre 68 des Statuts Refondus pour le Bas Canada, et qu'elle a obtenue une charte spéciale par les dispositions du Statut de Québec de 1881, 44-45 Vic., chapitre 62, intitulé ; " Acte concernant la compagnie d'assurance mutuelle contre le feu de la Cité de Montréal, et pour d'autres fins ;"

" Considérant que par la section 7 de ce dernier statut la compagnie défenderesse peut assurer des maisons et bâtisses situées dans la cité de Montréal, et le ménage de l'assuré ;

" Considérant que la demanderesse a assuré sa maison et son ménage, et que cette assurance parait avoir été effectuée par la défenderesse, conformément, et en vertu des dispositions de la dite section 7 du dit statut ;

" Considérant qu'en vertu des dispositions de l'article 944 code civil, le grevé possède pour lui-même à titre de propriétaire à la charge de rendre et sans préjudice aux droits de l'appelé, et qu'il résulte des dispositions du dit article que lorsque la demanderesse a déclaré qu'elle était propriétaire de l'immeuble assuré, elle n'a pas fait une fausse déclaration comme le prétend la défenderesse ;

" Considérant qu'il est bien vrai qu'en vertu de la section 20 du chapitre 62 des statuts de Québec de 1881, toute personne demandant à effectuer une assurance doit déclarer en quelle qualité elle fait telle demande, et qu'une fausse déclaration à cet égard rend nulle la police qui est émanée, mais que même en admettant que la demanderesse aurait déclaré en termes formels qu'elle était propriétaire du dit immeuble, ce qui n'est pas établi, puisqu'il est admis que la demande d'assurance a été signée en blanc, il n'en serait pas moins vrai que sa déclaration n'est pas fausse, et qu'elle est aux yeux de la loi propriétaire du dit immeuble quoique grevée de substitution ;

" Considérant de plus que par la section 21 du dit statut toute bâtisse sujette à une substitution, peut validement

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être assurée à la compagnie défenderesse, et que le billet de dépôt donné dans tel cas est sujet aux mêmes formalités et a les mêmes effets et privilèges que dans les cas ordinaires, pourvu qu'il soit signé par le grevé de substitution ;

" Considérant qu'il a été admis que le billet de dépôt a été signé par la demanderesse elle-même grevée de substitution, comme susdit, et qu'il résulte des faits de cette cause et des dispositions de la dite section 21 que la dite assurance du dit immeuble est valide et légale ;

" Considérant que la demanderesse n'a pas déclaré formellement que les objets mobiliers assurés étaient dans la dite maison, et qu'on ne peut dire non plus qu'il y ait de la part de la demanderesse une déclaration implicite à cet effet, mais qu'au contraire on peut présumer que la défenderesse connaissait qu'une partie des dits objets mobiliers ne serait pas constamment dans la dite maison ;

" Considérant qu'on peut admettre que la défenderesse était censée connaître que la demanderesse déposerait certains effets parmi ceux qui étaient assurés dans la cuisine d'été et dans le hangar, et que même certains effets ne pouvaient par leur nature être déposés que dans le hangar, comme par exemple, le charbon ;

" Considérant qu'il résulte des dispositions de la section 7 du chapitre 62 des statuts de Québec de 1881, et de la cédule B., annexée au dit statut, que le principal objet de la dite compagnie est d'assurer les bâtisses occupées par les assurés ou les membres de la compagnie et leur ménage, c'est-à-dire le ménage qui se trouve dans les dites bâtisses, et que cela résulte aussi des termes du deuxième alinéa des informations générales qui se trouvent en tête des règlements de la défenderesse, où elle dit qu'elle assure aussi le ménage du propriétaire ainsi que son cheval et sa voiture ;

" Considérant qu'il résulte des faits et circonstances prouvées en cette cause que la demanderesse a entendu faire assurer, et la défenderesse a entendu assurer les bâtisses où résidait la demanderesse, et les meubles de ménage et effets mobiliers qu'elle avait dans les dits lieux ;

" Considérant qu'après la dite assurance effectuée la dite

demanderesse n'était tenue qu'à ne rien faire qui put augmenter le risque assumé par la défenderesse, et qu'elle pouvait jouir de son ménage et de ses effets mobiliers comme elle en jouissait avant d'être assurée, sans être soumise à plus de risque à cet égard, et que la défenderesse devait présumer que la demanderesse pourrait mettre et déposer certains effets mobiliers dans le hangar ou la cuisine d'été, suivant que les circonstances où elle se trouve l'exigeraient, comme cela du reste se pratique partout ailleurs ; et vu qu'il est prouvé que la demanderesse n'avait pas d'autre lieu pour mettre les dits effets ;

" Considérant que si les parties ne paraissent pas s'être entendues quant au lieu où se trouvait le ménage, il est constant qu'il y a eu consentement mutuel et qu'elles se sont entendues pour assurer ce ménage, sans mention de l'endroit où il se trouvait ;

" Considérant que la défenderesse ne peut invoquer en sa faveur les dispositions de la section 19 de ses règlements, qui décrète que le transport du ménage ou de tout autre objet assuré dans des lieux autres que ceux désignés dans la police rendra l'assurance nulle sur ces objets, à moins que la compagnie n'y ait donné son consentement par écrit, vu que le fait de déposer certains articles assurés dans la cuisine d'été n'est pas un transport dans des lieux autres que ceux désignés dans la police dans le sens du dit article des dits règlements, et que le ménage de la demanderesse parait avoir été assuré pourvu qu'il se trouve sur les lieux occupés par la demanderesse et mentionnés dans la police, comme cela parait d'ailleurs être stipulé par les règlements de la dite défenderesse et, nommément par la dite section 12 des dits règlements et par la vingt-cinquième condition de la dite police ;

" Considérant qu'il est bien vrai que par l'article 2485 du code civil l'assuré est tenu de déclarer pleinement et franchement tout fait qui peut indiquer la nature et l'étendue du risque, empêcher de l'assumer ou influer sur le taux de la prime ; mais qu'il ne parait pas évident que même si la demanderesse eut déclaré qu'elle mettrait temporairement suivant le besoin et suivant les saisons une partie

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des effets assurés dans le hangar et la cuisine d'été, la défenderesse eût considéré ce risque comme inacceptable, sous ces circonstances, mais que le contraire parait plus probable ;

" Considérant que lors du dit incendie les biens meubles et effets mobiliers n'étaient pas exposés à un plus grand risque qu'au moment où l'assurance a été effectuée, et qu'il n'y a pas lieu d'appliquer à la cause actuelle les dispositions de la section 29 du chapitre 62 des statuts de Québec de 1881, et de la septième condition de la dite police ;

" Attendu que les arbitres nommés par les parties, en vertu de la section 36 du chapitre 62 des statuts de Québec de 1881, ont, par leur rapport en date du 14 novembre 1883, constaté qu'ils avaient fait l'estimation des dommages causés par le dit incendie aux bâtisses assurées et que ces dommages s'élevaient à la somme de $150, pour la maison, $60 pour la cuisine d'été et $60 pour le hangar, formant un montant total de $270 de dommages causés aux dites bâtisses par le dit incendie ;

" Attendu que les arbitres nommés par les dites parties pour constater les dommages faits aux meubles de ménage assurés par la défenderesse comme susdit, ont fait rapport que les dits dommages ainsi faits aux dits meubles et effets mobiliers, tant ceux situés dans la maison que dans la cuisine d'été et le hangar ci-dessus mentionnés, s'élevaient à la somme de $771.75, et qu'il est admis que la demanderesse a aussi souffert des dommages au montant de $28 pour un tapis qui se trouve avoir été omis du dit rapport, formant un montant total de dommage pour les dits effets mobiliers de $799.75 ;

" Considérant que par la section 44 du dit chapitre 62 des statuts de Québec de 1881, il est décrété que le fait de l'arbitrage ne constituera pas une renonciation par cette compagnie à son droit d'invoquer toute cause de déchéance connue seulement depuis la nomination des arbitres, et qu'il résulte de cette disposition que le fait de l'arbitrage constitue une renonciation à son droit d'invoquer toute cause de déchéance connue avant la nomination des arbitres ;

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" Considérant que la défenderesse connaissait avant la nomination des dits arbitres qu'une partie des dits effets mobiliers assurés se trouvaient dans la cuisine d'été et dans le dit hangard, lors du dit incendie, et que ce n'est que par témoins qu'elle a prouvé qu'elle s'était opposée à l'évaluation des dommages causés aux biens meubles se trouvant dans la cuisine et le hangard ;

" Considérant qu'en vertu de la section et du chapitre 62 des statuts de Québec de 1881, les frais de l'arbitrage doivent être partagés également entre la compagnie et l'assuré ;

" Considérant que les défenses de la défenderesse sont mal fondées et que l'action de la dite demanderesse est bien fondée ;

" A renvoyé et renvoie les dites défenses de la défenderesse et a maintenu et maintient l'action de la dite demanderesse, et a condamné et condamne la dite défenderesse à payer à la dite demanderesse pour les causes plus haut énoncées la somme de $1069.75 courant, avec intérêt sur icelle à compter du 28 janvier 1884, jour de l'assignation, et les dépens distraits à Mtre. Brunet, avocat de la demanderesse ; les frais d'arbitrage devant être partagés par moitié entre les dites parties."

Ce jugement a été porté en cour d'appel.

E. Lef. de Bellefeuille pour la demanderesse.

L. O. David pour la défenderesse.

BABY, J. :—

C'est ici une compagnie d'assurance mutuelle qui se plaint d'avoir été condamnée, en Cour Supérieure, à payer à l'assurée un certain montant d'assurance. Elle s'oppose et résiste à cette réclamation on ne peut plus énergiquement, quoiqu'une autre expression pourrait fort bien être employée, sous les circonstances.

Voyons, de suite, quels sont les faits de la cause :

Le 5 d'octobre 1883, à Montréal, l'intimée fit un contrat d'assurance avec la Compagnie appelante pour l'espace de trois années, et remit à cette dernière, par l'entremise de son mari, son billet pour $174 et, en plus, la somme de $8.68 en argent.

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Le montant de l'assurance était de $3,520 et se décomposait comme suit: $1,400 pour la maison, $60 sur une cuisine d'été attenante à la maison et ayant communication avec le hangar; et $2,000 sur les meubles de ménage, hardes et linges, etc., le tout la propriété de l'assurée.

Comme la police d'assurance n'était pas encore préparée, on lui promit, tel que cela se pratique ordinairement, de la lui remettre sous un court délai.

Un peu plus d'un mois après, le 9 novembre suivant et avant que cette police eut été remise à l'intimée, un incendie éclate dans les lieux ainsi assurés et les dommages causés par le feu s'élevèrent, tel que constatés par l'arbitrage qui eut lieu immédiatement après, à la somme de $799.75 pour les meubles et $270 sur l'immeuble, formant en tout $1,069.75.

On avait fait signer la demande d'assurance *en blanc*, mais, immédiatement après l'incendie, ce papier et la police furent remplis par les officiers de la Compagnie, et ces deux documents se trouvèrent à contenir, en rapport avec les meubles dont il y était question, les mots: "*contenus dans la dite maison.*"

L'intimée, dès qu'elle a eu connaissance de cette insertion, déclara que son intention, ainsi que la Compagnie le savait fort bien, était d'assurer tous les meubles, linges et hardes qui se trouvaient dans les bâtisses assurées, et non pas seulement ceux contenus dans la maison construite en briques.

L'appelante s'étant subséquemment refusée de payer à l'intimée le montant fixé par les arbitres nommés de part et d'autre, fut poursuivie et elle contesta cette action en alléguant, dans une première exception, que l'assurée n'avait pas déclaré les choses telles qu'elles étaient; que si elle eut dévoilé le fait que partie des meubles en question étaient dans la cuisine d'été, qu'ils n'auraient pas été assurés ou, du moins, un plus haut taux d'assurance lui aurait été demandé, etc.; qu'elle ne pouvait réclamer que pour les meubles qui se trouvaient dans la maison et qu'il lui revenait, en conséquence, pour dommages tant à l'immeuble qu'aux meubles que la somme de $360.25 qu'elle consignait en Cour.

Dans une seconde exception, elle allègue que les effets, hardes, etc., n'ont été transportés dans la cuisine en question qu'après le 5 octobre 1883, date de l'assurance, et ce sans avis à et permission de la Compagnie, ce qui mettait fin au contrat d'assurance, et que l'intimée, en conséquence, perdait tout droit de recouvrer aucune somme de deniers excédant les $360 par elle consignées.

Vient ensuite une troisième exception dans laquelle tous les faits sont relatés et où l'appelante insiste encore sur ses prétentions et en arrive aux mêmes conclusions que ci-dessus.

Subséquemment, après l'enquête commencée et considérablement avancée, l'appelante obtient la permission de la Cour de produire et produisit, en effet, un quatrième plaidoyer dans lequel elle reproche à l'intimée d'avoir fait une autre déclaration fausse dans sa demande d'assurance en disant qu'elle était propriétaire de l'immeuble qu'elle voulait assurer, en autant qu'elle n'en jouissait qu'à titre de grevée de substitution et que, par là même, la dite assurance se trouvait radicalement nulle, et demande, cette fois, le débouté de l'action pur et simple.

On le voit, les défenses de l'appelante peuvent se résumer en ces deux propositions : 1o Les meubles pour lesquels on réclame ne sont pas couverts par la police d'assurance, parceque s'ils étaient dans la cuisine, à la date du contrat, l'intimée aurait dû le déclarer et, s'ils étaient dans la maison, elle ne pouvait les transporter dans cette cuisine sans la permission de l'appelante.

2o. D'ailleurs, la police est radicalement nulle, faute par l'intimée d'avoir demandé l'assurance comme grevée de substitution, ce qu'elle est.

La Cour de première instance a rejeté ces prétentions et accordé à l'intimée les conclusions de sa demande. Nous devons en faire autant, car ce tribunal les trouve mal fondées. En assurant ses meubles, linges et hardes, tel qu'elle l'a fait, l'intimée ne se privait nullement du droit de les transférer, selon les besoins de la famille, dans aucune partie des lieux assurés ; c'était évidemment l'intention des contractants et cela résulte de l'ensemble de la preuve. Autrement en serait si elle avait trans-

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La Cie d'Assurance et Villeneuve.

porté ces choses au dehors des lieux assurés sans la permission de l'appelante. Alors, et dans ce cas, l'intimée aurait fatalement enfreint les conditions de la police d'assurance.

S'il fallait en croire l'appelante, l'intimée ne pouvait pas faire transporter dans cette bâtisse, sans une permission spéciale de sa part, son argenterie pour la faire éclaircir, sa vaisselle pour la faire laver, ses hardes pour les faire sécher, ou son linge pour le faire lessiver, bâtisse qu'elle connaissait être une cuisine d'été et devoir être appropriée à l'usage auquel on fait servir une telle pièce dans des familles de la position sociale et des conditions de fortune de l'intimée. Cela serait exorbitant et cette Cour ne peut consacrer une telle prétention, évidemment.

Maintenant, quant à la substitution, nous sommes d'opinion que l'intimée avait droit, comme grevée, d'assurer la propriété. Les autorités sont claires sur ce point et la jurisprudence du pays est aussi dans ce sens. Elle possède en son nom comme propriétaire et peut donc assurer cet immeuble, et on ne saurait l'accuser d'avoir fait une fausse déclaration en ne se disant point grevée de substitution dans sa demande d'assurance qu'on lui a fait signer *en blanc* d'ailleurs.

Nous le savons, le contrat d'assurance est de droit strict et on ne peut guère en étendre les termes, mais, au moins, faut-il lui donner une interprétation raisonnable et pratique, et c'est ce que nous faisons en écartant celle que l'appelante voudrait faire prévaloir.

Je puis ajouter que le fait que les articles perdus ou endommagés étaient sur les lieux assurés n'est pas nié, et qu'aucune fraude ou mauvaise foi n'a été imputée à l'intimée, soit quant à la cause de l'incendie, soit quant à la valeur de ces articles.

Sur le tout, nous trouvons donc que l'intimée est bien fondée dans sa réclamation et le jugement dont est appel lui ayant donné gain de cause, nous le confirmons avec dépens.

Jugement confirmé.

A. Brunet, avocat de la demanderesse.

De Bellefeuille & Bonin, avocats de la défenderesse.

(J. J. B.)

September 26, 1885.

Coram DORION, C. J., MONK, RAMSAY, TESSIER, BABY, JJ.

JOSEPH BRUNET ET AL.,

(*Plaintiffs in Court below*),

APPELLANTS;

AND

LA CORPORATION DU VILLAGE DE LA COTE ST. LOUIS,

(*Defendant in Court below*),

RESPONDENT.

Powers of Municipal Corporation—Agreement to open street.

A Municipal Corporation cannot validly bind itself to make a by-law for the opening of a street, and no action will lie against such Corporation for failure to carry out an agreement for the opening of a street.

The appeal was from a judgment of the Superior Court, Montreal, (SICOTTE, J.), May 29, 1879, dismissing the appellants' action, in the following terms:—

"La cour, etc.....

"Considérant que les demandeurs ne peuvent réclamer des dommages contre la défenderesse, à raison de ce que certains travaux et l'ouverture de certaines rues projetées, par et d'après les résolutions relatées dans l'action, qui ont été adoptées par le conseil de la dite corporation, n'ont pas été exécutés quant à la rue Drolet;

"Considérant qu'il n'y a pas eu d'engagement entre les parties, de nature à ce que l'inexécution des travaux projetés pût donner lieu à une responsabilité pour dommages contre la corporation, tel que demandé;

"Considérant d'ailleurs que les demandeurs n'ont pas fait et exécuté ce qui leur incombait pour permettre à l'autorité municipale d'agir en conformité aux résolutions susdites, relatives à la rue en question; et que les deman-

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Brunet & Corporation Cote St. Louis.

deurs n'avaient aucun droit acquis auquel la défenderesse ait porté préjudice;

"Considérant que l'indemnité réclamée n'est pas à raison de dommages actuels et directs, occasionnés par le mauvais état des chemins et des rues; mais que ces dommages sont éloignés, incertains, calculés sur des espérances et des chances fort problématiques de profit dans la vente des quelques lots que les demandeurs ont encore à vendre dans le terrain acheté par eux dans un but de spéculation, par la revente en petites portions;

"Considérant que les demandeurs n'ont pas prouvé les allégations de leur demande;

"Considérant que la défenderesse n'est responsable d'aucun dommage et d'aucun préjudice envers les demandeurs, déclare leur action mal fondée et la déboute avec dépens distraits à l'avocat de la défenderesse."

Hon. A. Lacoste, Q.C., and *Hon. R. Laflamme*, Q. C., for the appellants.

Joseph Doutre, Q.C., and *J. O. Joseph*, for the respondent.

RAMSAY, J.:—

This is an action of damages. In 1873 the appellant was a proprietor within the limits of the Municipal Corporation of Cote St. Louis. Being desirous of disposing of his property to advantage, he entered into negotiations with the officers of the Corporation to open two streets, and to demolish an old stone house. In consideration of these undertakings the appellant was to give the Corporation a strip of land. The Corporation agreed to these propositions, and went so far as to pass a resolution in the sense of the agreement with appellants, and took possession of the strip of land, but the Corporation did not open the streets, and did not remove the old house. The appellant sued the Corporation, seeking damages for the failure to open the streets. The action was dismissed in the Court below, and we think rightly. No such action will lie. The executive of a Municipal Corporation cannot bind itself otherwise than the law directs. It cannot bind itself to make a by-law. This depends upon the general principle that the State, of which a Corporation is

a dismemberment, cannot acquiesce, so as to limit its general powers, and this again depends on the well-known maxim—*jus publicum privatorum pactis mutari non potest.* We are, therefore, to confirm with costs, reserving to the appellant any rights he may have as to the strip of land said to be taken by the Corporation, or to any damages he may have suffered owing to his deprivation of the use of it.

Judgment confirmed.

Lacoste, Globensky, Bisaillon & Brosseau, attorneys for appellant.

J. O. Joseph, attorney for respondent.

(J. K.)

November 23, 1885.

Coram DORION, C. J., RAMSAY, CROSS, BABY, JJ.

THE CONNECTICUT AND PASSUMPSIC RIVERS RR. CO. v. THE SOUTH EASTERN RR. CO. ET AL.

Procedure—Motion for security for costs—Absentee defendant—Pleading without reserve.

HELD:—1. (Following *Bowker Fertilizer Co.* v. *Cameron*, 7 Leg. News, 214), that a motion for security for costs may be presented after the expiration of four days from the return of the writ, if notice of the motion has been given within the four days.

2. A non-resident defendant is entitled to ask for security for costs, from a non-resident plaintiff.

3. Where a non-resident defendant has been summoned by advertisement, under C. C. P. 68, the four days run from the expiration of the two months within which he is ordered to appear, and if such delay expires in vacation, the delay runs from Sept. 1.

4. Where a defendant, after giving notice of motion for security for costs, pleads without reserve of his right, he waives his right to security.

Kavanagh, for defendant Hendee, a non-resident, moved for leave to appeal from a judgment of the Superior Court (DOHERTY, J.), dismissing a motion for security for costs,

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The C. & P. Rivers R.R. Co. v. South Eastern R.R. Co.

as made too late, it being filed after the expiration of four days from the return of the action. The defendant Hendee was summoned by advertisement, and appeared on the 1st September. Notice of motion for security was served on the 4th September, and the motion was made on the 11th September. The decision of the Court of Appeal in *Bowker Fertilizer Co. & Cameron*, (1) showed that this was regular, and that the motion should have been granted.

Lonergan, for the plaintiffs, said this case was not quite the same as the *Bowker* case. The action was returned May 19, and the motion for security should have been filed May 23. But the defendant Hendee, being a non-resident, was summoned by advertisement. He pleaded an exception to the form on September 4, and made a motion for security for costs, September 11. It was submitted that being a foreigner, he was not entitled to the benefit of C. C. 29 as to security. Further, that he was not entitled to a longer delay for asking security than the resident defendants. Lastly, that by pleading an exception to the form without reserve, he had waived his right to obtain security for costs; C. C. P. 128, amended by 35 Vic. (Q.), c. 6, s. 6.

DORION, C. J.:—

This is a motion for leave to appeal from a judgment which rejected a motion made by the petitioner Hendee in the Court below, asking for security for costs. Both parties are absentees: the plaintiffs have their principal place of business in the United States, and the defendant Hendee is one of several defendants, also resident in the United States. He was called in by advertisement, and appeared on 1st September. On the 4th September he gave notice of motion for security for costs. On the same day he filed a plea without any reserve of his right to security. We think that he was entitled to security, and that the giving notice of motion within four days was sufficient, but that having pleaded over, and without any

(1) 7 Legal News, 214.

reserve, he has waived his right to obtain security for costs. An attempt has been made to draw a distinction, that it was an exception to the form that he pleaded. But he was no more obliged to file an exception to the form than to plead to the merits; 35 Vic., c. 6, s. 6. The motion for leave to appeal is therefore dismissed.

Motion rejected.

Campbell Lane, attorney for plaintiffs.
Hatton & Kavanagh, attorneys for defendants.
(J. K.)

December 30, 1885.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

L. J. PAPINEAU.

(*Defendant below*),

APPELLANT;

AND

P. C. TABER ET UX

(*Plaintiffs below*),

RESPONDENTS.

Assault—Damages—Costs.

HELD:—Where there is a right of action for a trifling assault, and where no material damage is done, and the plaintiff refuses all settlement, and begins and then abandons a prosecution before a magistrate, in order to bring an action of damages, the Court will reduce damages which have no reasonable measure, to such a sum as would be imposed as a fine by a magistrate.

The action was for $2,000 damages for an assault. It appeared that one evening as the female respondent and her mother were proceeding along the street in Montebello, the appellant with a manservant came up, the former caught the young woman by the arm, she was frightened and screamed, and the two men then went away. Sub-

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sequently, the appellant wished to apologize, on the ground that he had taken the women for servants of his father, the seignior, coming out of the manor grounds, and wished to see who they were; but the apology was not listened to, and criminal proceedings for assault were instituted. The criminal proceedings were afterwards abandoned and a civil suit commenced. The Superior Court at Aylmer (McDOUGALL, J.) allowed $100 damages.

Lafontaine for the appellant.

J. M. McDougall for the respondents.

RAMSAY, J.:—

It appears from the evidence that the appellant laid his hand on the arm of one of the ladies. She was alarmed, and uttered a shriek. The appellant retired, and the ladies went away unhurt. The appellant went afterwards to the residence of the ladies to offer some explanation or apology. He was received with a display of great indignation, and the door was kept shut against him. The next day the father of the young man went to explain that his son had mistaken the ladies for servants leaving the grounds of the manor house; but the explanation was not accepted, and nothing but the law would satisfy them. The respondent went before a magistrate and made a complaint, and this, no doubt, was the proper course. In the complaint the assault was represented as a trifling one. Then the assault case was abandoned, and an action brought for a large amount of damages. The plaintiff has proved no damages at all, but she has proved a right of action. So, the only question is the amount of damages which should be allowed. The Court here considers $100 unreasonable. These people are really making a mountain out of a molehill. It is a case very difficult to deal with, because the costs have to be considered. The Court has resolved to lay down a rule, which, however, may not apply except in cases where the circumstances are nearly similar. The plaintiffs having established a right of action, and the damages being unreasonable, the Court will reduce the damages to such a sum as might have been

imposed as a fine by a magistrate. We reduce the damages from $100 to $20 and costs; and the appellant will have to pay the costs in appeal, as well as in the Court below, for otherwise the plaintiff would be punished.

TESSIER, J., who was not present at the delivery of the judgment, was in favor of confirming purely and simply.

The judgment is as follows:—

" The Court, etc.....

" Considering that an assault has been established, but that no damages appreciable in money have been proved;

" And considering that the imposition of a moderate fine would, under the circumstances, have sufficiently punished the appellant and vindicated the law;

" And considering, moreover, that the respondent rejected all offers at an apology or settlement;

" But considering that the respondent had a right of action;

" Doth confirm the principle on which the judgment appealed from is based, to wit: the judgment rendered by the Superior Court sitting at Aylmer, on the 5th of May, 1884, and doth confirm the same, but doth modify the adjudication as to damages, and doth reduce the condemnation as to damages to the sum of $20, which the said appellant is condemned to pay to the respondents in their said names and qualities, with costs as well of the Court below as of this appeal."

Judgment modified.

Préfontaine & Lafontaine, attorneys for appellant.

C. B. Major, attorney for respondents.

(J. K.)

May 26, 1885.

Coram DORION, C. J., RAMSAY, CROSS and BABY, JJ.

NORMOR v. FARQUHAR.

Procedure—Inscription for Enquête—C. C. P. 234.

An inscription upon the roll *des enquêtes* for enquête, without the consent of the opposite party, is regular.
Exchange Bank & Craig, M. L. R., 1 Q. B. 39, distinguished.

The defendant moved for leave to appeal from an interlocutory judgment of the Superior Court, Montreal, (MATHIEU, J.), May 15, 1885, dismissing her motion to reject the plaintiff's inscription for enquête.

The issues in the suit having been completed, the plaintiff, without the consent of defendant, inscribed the case on the roll d'*enquête*. The inscription, dated May 4, 1885, reads as follows:—"La demanderesse inscrit cette cause "sur le rôle des enquêtes, pour enquête en icelle, pour "mercredi le 13me jour de mai courant, et en donne avis "à Messrs. Church & Co., avocats de la défenderesse."

The defendant moved to reject the inscription, "inas- "much as she had not given her consent to the same, but "on the contrary she had, after receiving notice of said "inscription, declared her option to have the case tried at "enquête and merits."

The motion being rejected by the Superior Court, the defendant petitioned for leave to appeal.

J. S. Hall, for defendant moving, relied upon *Exchange Bank* v. *Craig*. The inscription was not an inscription for proof and final hearing under Art. 243; it must therefore be considered as an inscription for the adduction of evidence at length, which requires the consent of all the parties, as held by this Court in *Exchange Bank* v. *Craig*.

Mignault, for the plaintiff, cited *Gregory* v. *The Canada Improvement Co.* (1) In that case it was held by Mr. Jus-

(1) 4 Leg. News, 390.

tice Papineau that a party may inscribe on the roll d'*Enquête* for the adduction of evidence, without the consent of the opposite party. The inscription was in accordance with article 234 of the Code of Procedure.

RAMSAY, J. (*diss.*):—

I think leave to appeal should be allowed. It is not safe to say what practice may not be established under the C. C. P. and its amendments, but I think we have practically decided the question before us in *The Exchange Bank & Craig.*(1) The judge in the Court below distinguished this case from it by saying that in the *Exchange Bank & Craig* the inscription was for the adduction of evidence "*at length.*" It is argued that there are now three modes of taking evidence, (*a*) at length by consent in the old form, (*b*) by notes (taken by the judge), or (*c*) by inscription for proof and merits at the same time. I think this is a misinterpretation of the code and the statutes, and that there are only two modes of taking evidence. Art. 243 creates the inscription for proof and hearing at the same time, as the regular mode of procedure. Art. 284 then permits the parties, by consent, in writing, to proceed at length, and in the old manner, before a judge or the prothonotary. This becomes very clear by article 286, which says: "The evidence is taken down in writing, "either at length or in notes, according to the provisions "contained in this section." There is no provision in that section, or in any other, for a third mode of taking evidence. Art. 234 has been cited; but that is clearly a rule which provides generally that cases shall be inscribed for the adduction of evidence when not to be tried by jury. It is perhaps an unnecessary but harmless article, which does not pretend to give an additional manner to take evidence. (2)

(1) M. L. R., 1 Q. B. 39.

(2) The effect of this ruling, reversing as it does, what was held in the *Exchange Bank & Craig*, taken with the decisions in *Gregory & The Canada Improvement Co.*, is to establish, that if a party chooses to inscribe, with-

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Normor v. Farquhar.

DORION, C. J.:—

This Court decided in the case of *Exchange Bank* v. *Craig*, that a party cannot inscribe for the adduction of evidence at length without the consent of the other parties to the cause. Here the plaintiff has merely inscribed for enquête, and it appears to the majority of the Court that the inscription is regular and falls under Art. 234 " which reads as follows:—" When the case is not to be " tried by a jury, either of the parties may inscribe it on " the roll for the adduction of evidence." It is not an inscription for evidence *au long*, under Art. 285, which requires the consent of all the parties, and therefore this case is not like *Exchange Bank* v. *Craig*. The motion for leave to appeal is rejected.

Petition for leave to appeal rejected.

Church, Chapleau, Hall & Nicolls, Attorneys for defendant.

Archambault, Lynch, Bergeron & Mignault, Attorneys for plaintiff.

(J. K.)

out putting the words " at length " in his inscription, and if he can manage to get his inscription filed before the other party, he can compel his adversary to go on at length, although there be no consent in writing. With a little goodwill on the part of the Courts, under the ingenious legislation of the 34 Vict. it is not impossible to assimilate almost completely the system of proof and merits to the old system of double inscription. R.

November 25, 1885.

Coram DORION, C.J., MONK, TESSIER, CROSS and BABY, JJ.

JANE WADSWORTH,

(*Defendant in Court below*),

APPELLANT;

F. A. McCORD ET AL.,

(*Plaintiffs in Court below*),

AND

SUSAN McMULLEN,

(*Intervener in Court below*),

RESPONDENTS.

Matrimonial domicile—Declaration in act of marriage.

HELD:—1. To constitute a matrimonial domicile there must be the fact of residence coupled with the intention to remain in the place.

2. Where the husband declared in the act of marriage that his domicile was in Quebec, such declaration in the presence of the officer who performed the ceremony, and whose duty it was to ascertain and set forth the domicile of the parties married, must be considered a formal declaration of intention sufficient to establish the matrimonial domicile.

3. Apart from such declaration in the act of marriage, the facts of the present case were sufficient to prove that the intention of the consorts was to establish their matrimonial domicile in the Province of Quebec, and that it was established there.

The appeal was from a judgment of the Superior Court, district of Aylmer (McDOUGALL, J.), May 13, 1884, in favor of the intervener. The questions involved are fully explained in the opinions.

The following is a portion of the *acte de mariage* referred to:—"Le 23 sept. 1828, vu la dispense de deux bans de mariage accordée par Monseigneur B. C. Panet, évêque de Québec, en date du 20 du présent mois, et la publication du troisième faite au prône de notre messe paroissiale de dimanche dernier entre James Wadsworth, journalier de

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cette ville, fils majeur de Wm. Wadsworth etc. d'une part, et Mary Quigley, veuve de James McMullen, du township de Nepeen, dans le Haut-Canada, d'autre part, etc."

Fleming, Q. C., and *Hon. R. Laflamme*, Q. C., for the appellant.

Foran, and *Barnard*, Q. C., for the respondent.

CROSS, J.:—

The decision of this case turns upon a question of domicile. James Wadsworth, a laboring man, in the employ of a lumberer named McMullen or Mullen, whose chief seat of operations was on the river Bonnechère in Upper Canada, was in the habit of assisting to take down his employer's rafts to Quebec. McMullen having died in the year in question, Wadsworth had charge of the raft of the season to or at Quebec. There he met his employer's widow, Mrs. McMullen, then with her daughter Susan McMullen on their way back to Ireland, the native country both of Wadsworth and Mrs. McMullen whose maiden name is given as Margaret Quigley. Neither of them had any intention of remaining permanently at Quebec. They put up at the same boarding house at Quebec and after a short interval, were married. Wadsworth in the register was described as "*de la ville de Québec.*" This description was probably adopted to conform as near as possible to the rules of the Church requiring a previous residence for some definite time at the place of the celebration of the marriage. It seems certain that neither party contemplated other than a very temporary sojourn at Quebec, and more certain still that neither of them had acquired a domicile at Quebec. After the marriage Wadsworth proceeded to the scene of his operations on the Bonnechère, leaving his wife on the way at Hull, in Lower Canada now the province of Quebec. He continued his lumbering operations, and having built a dwelling more suitable for his wife on a property in which he was interested, he sent for her and her daughter to join him. They lived together there for a number of years, where several of their children were born. At

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a later time he removed with his wife and family to Aylmer, in Lower Canada, where they lived for a number of years, ultimately changing his residence to Ottawa where he died.

The respondents, grandchildren of Dame Margaret Quigley, claim that there was community of property between their grandmother and Wadsworth according to the laws of Lower Canada, and demand their share of it in right of heirship. Wadsworth by his will having left his property to his second wife, she disputes this claim, contending that there was no community, and that consequently the whole estate passed to her.

It has long been settled law in Lower Canada, now the province of Quebec, at least since the decision of the case of *Rogers* v. *Rogers* determined in 1847, (1) that the law of the domicile of the marriage determines the question as to whether a community of property is thereby created between husband and wife. This is not in fact disputed by the parties; the question is rather what constitutes a domicile, and whether the circumstances of this case warrant the conclusion that Wadsworth at the time of his marriage had acquired a domicile in Lower Canada. In my opinion he had not, and by consequence no community of property could be thereby created between him and Margaret Quigley, such community having no place either by the law of Ireland where they had their domicile of origin, or by the law of Upper Canada (now Ontario), the domicile of their adoption which he had in view at the time of the marriage,—and this by the admission of the parties themselves in regard to the law of these two countries.

According to all reliable authorities on the subject as I find them, when a person changes his domicile there must, in order to acquire a new one, be a concurrence of the intention as well as the fact of a new establishment with the purpose that it should be permanent before the old domicile is lost and a new one acquired. A new domicile is only acquired by deed and by act, *animo et facto*.

(1) 1 Revue de Législation, p. 255.

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In the present instance the domicile of the origin of the parties was Ireland, and that remained their domicile until they acquired another, which the facts show was at the Bonnechère, in Upper Canada now Ontario. See how this matter is treated in the Rep. de Merlin *vo.* Domicile, and in such books as Phillimore on Domicile as given in his first three or four chapters. I deem it unnecessary to cite decisions because, as I understand the authorities they are all to the same purpose on this point.

There is a modification of the rule that the domicile of marriage decides the question of community. It is this: when parties marry with the intention of changing their domicile, it is presumed that the domicile of intention, if adopted by them, is the one by which their marital rights in regard to community are to be governed. This qualification favors the pretensions of the appellant.

I cannot say that I am too well satisfied with the rule, but the matter is not now open to discussion. It is the one generally adopted by the countries on the continent of Europe, and certainly the one by which we have been for a long time guided in Lower Canada, the province of Quebec.

DORION, C. J.:—

I also differ from the judgment about to be rendered. As Merlin, *vo.* Domicile, says, there is nothing more difficult to decide than questions of domicile. This was said in France where the population is sedentary, but the difficulty here is greatly increased. Here is a man who left Ireland a grown up person. His domicile was in Ireland. The law is clear that the domicile of origin is the real domicile until another domicile has been acquired. Twenty or thirty years may intervene, but if the person has not acquired another domicile the domicile of origin continues to be his domicile. There was a case lately in Ontario (1) where a man had been twelve years away from his domicile, and it was held that his original domicile was still his domicile.

In the present case, the domicile of Wadsworth was in

(1) *Magurn* v. *Magurn*, 3 O.R. 570; 11 O.R. 178.

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Ireland when he went to Ontario to work in the woods. There was not a house there; he was a shanty man, and lived in Ontario, but it is difficult to say that he acquired a domicile in Ontario. After working there for two or three years he came down to Quebec with the rafts of his employers and married in Quebec. It is proved that he never lived in Quebec so as to acquire a domicile there. He was asked probably, where are you from? and he said, I am of Quebec. He was resident there, no doubt; but residence is not domicile. He took his wife to Hull and left her there boarding, while he went away to Ontario to continue his work of lumbering. Subsequently he brought his wife to a shanty in Ontario and they lived there.

The only thing to support the pretention that this man had a domicile in Quebec is that he declared in the act of marriage that he was of Quebec. The woman he married was not of Quebec, for she was just on her way back to Ireland. I am disposed to hold that if Wadsworth had a domicile in this country at all it was in Ontario, and not in Quebec. If he had no domicile in Canada, then his domicile was in Ireland, the domicile of origin. Neither by the law of Ontario nor by that of Ireland is there community of property, therefore the appellant was not bound to give an account of the property, and the judgment should be reversed.

TESSIER, J.:—

Il s'agit de décider où était le domicile conjugal des époux James Wadsworth et Margaret Quigley à l'époque de leur mariage.

Tout individu a un domicile légal; de même ceux qui se marient ont nécessairement un domicile matrimonial. Quoiqu'il soit difficile en certains cas de déterminer ce point, il faut le faire, parce qu'on ne peut pas décider qu'ils n'avaient pas un domicile lors du mariage; ce serait en ce cas décider qu'aucune loi civile ne s'appliquera pour régler les biens et droits présents et futurs des époux.

Dans l'instance actuelle, il faut remonter à une cinquan-

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taine d'années en arrière pour retracer les circonstances des époux, et il faut déterminer si leur domicile à l'époque de leur mariage était dans la province de Québec, ou dans la province d'Ontario, ou en Irlande d'où les époux étaient émigrés.

Les conséquences de cette décision sont graves pour les intimés McCord, enfants de feue Margaret Wadsworth, fille des dits James Wadsworth et Margaret Quigley. Si ce domicile était dans la province de Québec, les intimés McCord ont droit à une part dans la succession de leur aïeule Margaret Quigley par son droit de communauté avec James Wadsworth ; si ce domicile était dans la province d'Ontario, ou en Irlande, il n'y a pas eu de communauté entre les époux, et les intimés McCord n'ont droit à rien.

En 1822, James Wadsworth, à l'âge de 20 ans, émigrait d'Irlande au Canada ; de 1822 à 1825, il a continué à demeurer en Canada, mais il n'appert pas clairement par la preuve quelles ont été son occupation et sa résidence, mais de 1826 à 1828, époque de son mariage, il paraît qu'il était employé à travailler dans les forêts sur les bords de la rivière Ottawa et à descendre des radeaux ou cages de bois appartenant à James Mullen, premier mari de Margaret Quigley. Mullen en émigrant lui-même d'Irlande quatre ou cinq ans auparavant, y avait laissé sa femme avec un enfant, Susan Mullen, intervenante en cette cause.

La femme Margaret Quigley arrive au Canada en 1827, mais en arrivant elle apprend que son mari, James Mullen, est mort quelque temps auparavant. Elle se rend à Hull, dans la province de Québec, où elle demeure avec sa petite fille âgée de six ou sept ans. En 1828, elle descend à Québec avec l'intention de s'y embarquer pour retourner en Irlande. Là elle se trouve à loger dans la même maison que James Wadsworth qui était descendu à Québec sur un train de bois appartenant à feu James Mullen et son associé.

Après être resté quelque temps à Québec, James Wadsworth et Margaret Quigley, veuve de James Mullen, se

marièrent à l'église catholique, en la ville de Québec, le 23 septembre 1828, devant le rév. père McMahon, prêtre, et leur acte de mariage indique James Wadsworth comme étant de la ville de Québec, et elle, veuve de Jas. Mullen.

La petite fille Susan Mullen a rendu témoignage des circonstances qui ont précédé et suivi immédiatement le mariage ; elle est à peu près la seule personne, ou du moins, la seule survivante, qui ait eu connaissance de ce qui s'est passé alors. Elle dit : " Mr. Wadsworth boarded " in the same house with us (herself and Margaret Quig- " ley, her mother), but when he came there or how long " he was there before the marriage I cannot say. I can- " not say if he was there a fortnight before the wedding, I " think he was. We boarded at Mulhollands. Mr. Wads- " worth came to Quebec on a raft of timber. We remained " at Mulholland's after the marriage until we left Quebec. " After the marriage and some time in October (the mar- " riage was on the 23rd September), Mr. Wadsworth, my " mother and I came up to Hull, where we stayed at " George King's. Mr. Wadsworth left for the woods " after settling us at King's. He went up before the ice " took. My mother and I remained at King's until Mr. " Wadsworth returned in January 1829, when he took my " mother up the Bonnechère ; and *took me to Mr. Fulford's* " *in Hull.*"

Le témoin Mather dit : " The only building in Ottawa " city then was a small house occupied by Mr. Nicholas " Sparks." Qu'était-ce donc que Bonnechère alors ? Wadsworth travaillait dans la forêt, à un endroit appelé Bonnechère, sur les bords de l'Ottawa, dans la province d'Ontario. Il n'y avait pas alors de maison à Bonnechère, il n'y existait que trois ou quatre familles ; il se bâtit une hutte près de Mud Lake et un peu plus tard, il acheta une charpente de bâtisse, à peine commencée, d'un nommé Bélanger, à Bonnechère, et y demeura avec sa femme Margaret Quigley jusqu'en 1836. Alors il revint à Hull, province du Bas-Canada, où il demeura durant 25 ans, et c'est là que Margaret Quigley est morte et a été enterrée en 1872.

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Dans laquelle des deux provinces se trouve légalement leur domicile matrimonial ?

Pour constituer le domicile matrimonial, il faut le fait et l'intention. Le fait seul de la résidence ne suffit pas ; et c'est là une distinction importante. C'est le lieu où les futurs conjoints proposent de fixer le siége de leur association conjugale, qu'il convient de prendre en considération, pour déterminer leur commune intention quant au régime auquel ils entendaient se soumettre. Notre Code Civil, à l'article 80, dit : " Le changement de domicile s'opère par le fait d'une *habitation réelle* dans un autre lieu joint à *l'intention* d'y faire son principal établissement."

Il est difficile de trouver une résidence de fait dans un chantier où l'on va travailler ; on peut dire également que c'était à Québec où l'homme de chantier passait une partie de l'été, ou à Hull où il séjournait avant de remonter au chantier. L'incertitude existe sur le fait. C'est cette incertitude résultant de la vie aventureuse de James Wadsworth, qui l'a obligé de fixer son domicile et de l'indiquer lors de son mariage avec Margaret Quigley comme étant établi de fait et d'intention à Québec.

Ils ont manifesté ce choix et cette intention d'une manière formelle en présence d'un fonctionnaire public, qui était tenu de s'en enquérir et de constater les faits et l'intention des parties. Pourquoi le tribunal contredirait-il cette intention exprimée formellement par les deux époux qui ont signé l'acte de mariage ? Notre Code Civil pose la règle à l'art. 81 : " La preuve de l'intention résulte de " la déclaration de la personne et des circonstances."

Il n'y a pas d'acte plus solennel que l'acte enregistré de la célébration du mariage en présence de plusieurs témoins. C'est par là que les époux manifestent leur intention quant à l'existence de leur domicile et au régime de lois concernant le mariage qu'ils adoptent pour eux et leurs enfants à venir. Cela lie la femme, qui n'a pas d'autre domicile que celui de son mari. (C. C., art. 83).

Si en 1828, Wadsworth conservait encore l'espoir de retourner en Irlande, il en avait une bonne occasion en se

mariant à Margaret Quigley, qui était en route pour l'Irlande, de l'accompagner. Au contraire, il l'empêche de se diriger là en contractant mariage avec elle et en retournant à Hull, où, comme le dit Susan Mullen, *he settles them*, il les établit.

5 Aubry et Rau, pp. 275, 276: "En l'absence de tout "fait indiquant, d'une manière certaine, l'intention de la "part des époux de fixer le siége de leur association con-"jugale ailleurs qu'au domicile du mari, c'est ce domicile "qui est à considérer comme domicile matrimonial.

"On convient généralement que la circonstance du lieu où le mariage a été célébré, ne peut avoir d'influence sur la solution de la question de savoir quel est le régime que les époux sont censés avoir adopté. Mais certains auteurs enseignent que c'est la loi du domicile du mari au moment du mariage qui en l'absence de contrat, régit l'association conjugale. Voy. en ce sens: Foelix, Droit international et privé, Nos. 20, 27 et 69; Odier, 1, 47 à 51. A notre avis, cette manière de voir n'est pas exacte. Le domicile du futur époux ne saurait être considérée comme indiquant, par lui-même et nécessairement, de la part de la future épouse, l'intention de se soumettre à la loi de ce domicile. C'est le lieu où les futurs conjoints se proposaient de fixer le siége de leur association conjugale qu'il convient avant tout de prendre en considération, pour déterminer leur commune intention, quant au régime auquel il entendaient se soumettre; et ce n'est qu'en l'absence de circonstances de nature à indiquer le contraire, qu'ils doivent être présumés avoir voulu établir leur domicile matrimonial au lieu du domicile du mari." Merlin, Rép. *vo.* Loi, sec. 6, No. 2, et *vo.* Conventions matrimoniales, sec. 2. Demolombe, *loc. cit.* Coin Delisle, Revue Critique, 1855, VI, p. 193. Rodière et Pont, I, 36.

J'avoue qu'il est difficile de fixer le domicile de gens qui n'ont pas encore de résidence permanente, mais il faut choisir entre Québec, Hull, et la forêt de Bonnechère. Si vous dites que Bonnechère était à l'époque de leur mariage leur domicile matrimonial, *de facto et de animo*, où est la preuve de cette intention: tout montre le contraire,

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ils signent un acte solennel pour déclarer leur domicile à Québec : où est l'allégation ou la preuve de l'erreur? En vertu de l'art. 65 de notre code reproduisant la loi ancienne, le fonctionnaire est tenu de constater et indiquer le domicile des époux. Il l'a fait. *Omnia præsumuntur rite et solemniter acta, donec probetur in contrarium.*

A Québec, Wadsworth passait l'été à vendre sa marchandise, son bois ; à payer et renvoyer ses hommes, à recevoir des avances pour continuer ses chantiers. N'était-ce pas là son principal établissement d'affaires? Il a voulu fixer son domicile matrimonial à Québec et se soumettre aux lois de cette province. Pothier s'exprime ainsi au traité de la communauté, No. 16 : " Il faut dire que quoique, lorsque l'époux s'est marié, il n'eût pas encore acquis domicile à Orléans, il suffit qu'il eût eu dessein d'y faire son *domicile matrimonial*, et pour qu'il soit en conséquence censé avoir voulu suivre pour son mariage les lois d'Orléans plutôt que celles du domicile qu'il allait quitter."

Nouv. Denisart, *vo.* Communauté de biens, sec. 4, discute la loi qui régit la communauté légale et établit qu'il faut suivre celle du lieu où le mari mène sa femme et va s'établir immédiatement après la célébration, *i. e.*, qu'il faut suivre la loi du domicile matrimonial, et il continue comme suit, p. 706 : " L'application de cette règle souffre de la difficulté dans la pratique, parce que les conjoints ont pu changer d'avis, et établir leur domicile dans tout autre endroit que celui qu'ils avaient en vue au moment du mariage." Ainsi supposons que les époux vont se fixer dans un lieu autre que le premier domicile du mari, soit qu'ils choisissent le domicile de la femme, ou un domicile étranger à tous deux ; alors il n'est pas certain si la cohabitation en tel endroit est l'exécution d'une intention antérieure au mariage, ou bien d'une volonté subséquente du mari, à laquelle la femme est obligée de se conformer. Dans cette incertitude, il faut se décider par les circonstances particulières de chaque espèce."

1 Toullier, No. 372 : " Le fait doit toujours concourir avec l'intention. La résidence la plus longue ne prouve

rien, si elle n'est pas accompagnée de la volonté, tandis que si l'intention est constante, elle opère le changement avec la résidence la plus courte ne fut-elle que *d'un jour*, car du moment que le fait concourt avec l'intention, il *forme* ou *change* le domicile sans aucun délai."

Quant au domicile en Irlande, ce que l'on appellerait le domicile d'origine, il eut fallu prouver l'intention de le conserver et de retourner en Irlande. Les faits en preuve établissent le contraire.

Il se trouve une suite de circonstances qui établissent, à part leur déclaration formelle dans l'acte du mariage, que l'intention des époux était de faire leur domicile conjugal dans la province de Québec. Ils résident quelque temps en la cité de Québec, ensuite à Hull dans la même province, ils font baptiser et enterrer leurs enfants à Hull, ils mettent à l'école les enfants survivants à Hull, ils y résident après leur retour de la forêt de Bonnechère, ils y meurent tous deux. C'est bien là le siége de leur association conjugale.

Le jugement sera donc confirmé en obligeant l'intimée, la seconde femme à qui M. Wadsworth a tout donné par son testament, de rendre compte des biens et de remettre aux deux enfants McCord et à Susan Mullen leur part dans la communauté entre Wadsworth et sa première épouse, ou à payer $50,000 pour tenir lieu de cette part avec les dépens, mais le délai pour rendre compte sera prolongé de trente jours après signification du présent jugement.

MONK, J. :—

Even if the declaration of Wadsworth in the *acte de mariage* could be contradicted, in my opinion it has not been.

Here is a man who has emigrated from Ireland, just as millions of his countrymen did, to better his condition in the colonies, or in foreign countries. He comes to Canada at the age of 20 ; lives here ever after ; acquires property, makes Canada his home in every sense of the word, gets married twice in Canada, brings up in Canada his only

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surviving child by his first marriage, marries her to a Canadian, and at the age of nearly 80, he dies here, and is buried here, where his children and his first wife were also buried.

So far as appears, he never set foot in Ireland from the time he left it in 1822. Both common sense and authority seem to me to require us to hold that Wadsworth abandoned his domicile of birth and acquired a new domicile in Canada. It may be, or not be, a question whether his Canadian domicile was in Ontario rather than in Quebec.

One of my dissentient colleagues holds that his domicile was in Ontario, although he thinks it may possibly have been in Ireland, while the other thinks it was in Ireland, although it may possibly have been in Ontario. It is supposed that if there be a doubt where Wadsworth's Canadian domicile was (Quebec or Ontario), it must be held that his domicile of birth adhered to him. This is in my opinion an error. The moment it is beyond doubt that Wadsworth came to Canada to settle, and settled in Canada, then it is certain that his domicile was a Canadian domicile, and that his Irish domicile was lost. The pretention that his domicile could possibly have been in Ireland is not only untenable, but it seems to me to have been an afterthought. It was stated at the bar and not denied that the pleas, as originally filed, only spoke of the Ontario domicile, and that the plea respecting the Irish domicile was only put in afterwards by consent. But even taking the pleas in the order in which they are filed, it seems to me inconsistent to allege that Wadsworth abandoned his Irish domicile and acquired an Ontario domicile, and afterwards to say that he did not abandon his Irish domicile.

But it is stated that at the time of the marriage he had not yet acquired a Canadian domicile.

The presumption certainly is, from his subsequent conduct that he must have left Ireland for good, and that consequently, at the time of his marriage, six years after his arrival in Canada, he had acquired a Canadian domi-

cile. That when he married, he did not intend to return to Ireland is certainly proved by the fact that his wife was then on her way back to Ireland, and that he persuaded her to change her plans and to stay in Canada with him after their marriage. This, as my colleague, Mr. Justice Tessier has remarked, is conclusive that he could not have thought of returning to Ireland. But was his domicile at the time of his marriage a Quebec or an Ontario domicile? It is said that McMullen was of Ontario, and that before the marriage, Wadsworth being employed by him, must have been of Ontario also. No doubt McMullen in the *acte de mariage* was described as of Nepean in Ontario, but there is no proof that Wadsworth was employed by McMullen in Nepean. So far as there is any proof at all where Wadsworth was working before the marriage, and there is very little evidence indeed on that point which can be relied on, he was working in the woods in the vicinity of the Bonnechère river, not as a servant, domestic, but as a lumberer.

Then, we have his own declaration in the *acte de mariage*, a declaration signed by himself, that he was of Quebec. It is stated in the pleas that the declaration is written in French, and that Wadsworth did not understand the French language. But it has not been proved that Wadsworth did not understand the French language. The presumption is that during his six years' residence in Canada, he had learnt the French language, and Mrs. Colton expressly says that he understood French, spoke it and read it. Now, will any one who was acquainted with Father McMahon believe that he would have obtained Wadsworth's signature to a declaration which was not true, and which Wadsworth did not understand? Whether this declaration of Wadsworth can now be contradicted at all may be a question. But as a matter of fact it has not been contradicted, in my opinion.

There is nothing in the evidence which is really inconsistent with the truth of that declaration, and no place which can be mentioned that had a greater, or as good a title to be called his domicile as Quebec. His letters

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were addressed to him in Quebec, and Quebec he must have visited every summer, when he brought his employer's rafts to market. It is certainly impossible for me, with the facts in evidence, to believe for one moment, that this lumberman had, before his marriage, in the woods on the Bonnechère river, any home or establishment where he intended permanently to reside.

No doubt although Wadsworth's domicile may really have been at Quebec, at the time of the marriage, as stated in the *acte de mariage*, it was open to the appellant to allege and prove that Quebec was not the matrimonial domicile of the consorts, and that their intention was to go immediately after the marriage to live in Ontario, on the Bonnechère river, or elsewhere. But it is not proven that they had any such intention. The facts proved would indicate that what residence there was at the place now called Egansville on the Bonnechère river was not contemplated at the time of the marriage. That residence, moreover, does not appear at any time to have been attended with the conditions necessary to constitute domicile.

The legal presumption is that a man who, as a squatter, resides in the woods, on a lot which has not even been surveyed, and in connection with his lumbering operations, whether for seven years, as in this case, or for any number of years, for that matter, has no permanent settlement in view; and when it is considered that after these seven years, Wadsworth bought a farm in Hull and and settled there; when it is further borne in mind that it was in Hull that he had left his wife after his marriage; that it was in Hull that, when his wife joined him in the winter following, to share his shanty in the woods, he left his step-daughter to be educated; that it was in Hull that he caused his children, who died while he was in the woods, to be buried; that it was in Hull that he must have transacted any business which, as a member of a civilized community, he might have had to transact, the conclusion is irresistible that his real domicile after his marriage was in Hull, in Lower Canada, and not on the Bonnechère river, in Ontario.

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With regard to the question whether the declaration of Wadsworth in the *acte de mariage* could be contradicted, without an *inscription de faux*, so far as this case is concerned it is an unimportant one, if it is held that there is no evidence that the intention of the consorts at the time of the marriage was to settle in Ontario and establish their matrimonial domicile there. Then it would follow from his declaration that his domicile was Quebec before his marriage, and that at the time of his marriage, the matrimonial domicile of the consorts was there also,—in the absence of evidence of any other matrimonial domicile. The question of law as to the effect of the declaration of domicile in the *acte de mariage* turns upon the view one forms of the character of the duty imposed by the law of Lower Canada upon the *curé* who celebrates the marriage. The very strict rule of he law of Lower Canada is that the only *curé* having jurisdiction to marry the parties is their *propre curé*. The parties must be his parishioners, otherwise the marriage is a nullity. There may or may not have been exceptions to this rule, but it is unnecessary to discuss the question of these possible exceptions to the rule, for this case does not come within any of the exceptions referred to by the authorities on the subject.

Under the system of the old French law, was the *curé* bound to know of his own knowledge whether Wadsworth was his parishioner or not? If he is presumed to have known the fact of his own knowledge, or if at any rate before celebrating the marriage, he was bound to ascertain the fact, apart from the mere declaration of Wadsworth, then the declaration is conclusive and cannot be controverted without an *inscription de faux*.

There is certainly great force in the respondent's argument that the declaration in the *acte de mariage* is that of the *curé* rather than that of the parties. Not only does art. 65 of our code, in conformity with the old law, require the domicile to be set forth by the *curé* in the *acte de mariage*, but art. 63 provides that if the marriage is solemnized elsewhere than at the place of one or other of the

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parties, the *curé* is bound to verify and ascertain the identity of the parties, and while art. 131 shows that the parties should have an actual domicile established by a residence of at least six months in the place where they are married (in fact, the old law required a residence of twelve months where the parties came from another diocese), the following article 132 enacts that if the last domicile is out of Lower Canada, the *curé* is bound to ascertain that there is no legal impediment between the parties.

In view of these provisions of our law, it is certainly a very serious question whether the *curé*, in marrying those who profess to be his own parishioners, is not to be held to have personal knowledge of the fact. To hold that he is would be reasonable. The rule, at any rate, would have this very great advantage, that in a case like the present, where the declaration has never been contradicted by the husband in his lifetime, when both of the consorts are dead, as well as the *curé* who married them, evidence of the very unsatisfactory character of that adduced in this cause could not possibly be admitted to disturb the condition of the parties in the *acte de mariage*.

The appellant has cited two cases reported by Sirey where the declarations in the *acte de mariage* were not considered as conclusive on their face. I have examined those decisions very carefully, but do not consider them conclusive by any means. The system in France since the Revolution is different from the old French system, which gave the *curé* jurisdiction to marry his own parishioners, and so far as the general rule within which the present case falls, no others. In the second place, the two cases cited are very peculiar cases, so far as the facts are concerned, the evidence being of a very convincing character. Finally, the setting aside of the declaration in the *acte de mariage* in those cases had not the effect of diminishing the rights of the wife, but, on the contrary, had the effect of improving her condition.

But even admitting that an *inscription de faux* was not indispensable in this case, the other question in connec-

tion with the evidence, which the respondents have raised, remains. There is a declaration in the *acte de mariage* which is signed by the husband and wife, and the effect of this declaration is to give the wife the rights which arise from the existence of a legal community of property. The declaration is found in a document which the law of Lower Canada recognizes as an *acte authentique*. The declaration in that *acte authentique* if it be considered as a mere enunciation is still of as binding a character as between the parties, as in the marriage itself. The husband in this case could not have contested the declaration without alleging and proving error, and in such a case he would not have been admitted to adduce oral evidence; nor can the appellant, who is his representative, and has no more rights than he himself had, even if error had been alleged in good time.

Of course, the question involved in this case must be decided upon the law alone, and without reference to equity. But it is a satisfaction to me that the view I take of the law has the effect of preventing what would be a very manifest and very gross injustice, if it were held that no community of property resulted from the marriage in this case.

BABY, J.:—

Toute la difficulté entre les parties ici roule sur une question de domicile. Feu James Wadsworth dont on se dispute la succession, avait-il lorsqu'il a contracté son premier mariage, son domicile dans le Bas-Canada ou le Haut-Canada? Comme on le sait, cette question de domicile est presque toujours difficile à régler lorsqu'elle est soulevée. Cependant, dans l'espèce, je ne vois guère d'obstacle sérieux pour nous empêcher d'en venir à une solution assez prompte, si les déclarations de la personne et ses manifestations doivent nous guider. Nous l'avons vu, Wadsworth, encore bien jeune, après avoir quitté l'Irlande, lieu de sa naissance, s'en vient au Canada avec l'intention évidemment de s'y fixer, et où il se met, de suite, au service d'un marchand de bois dont, par après, il épouse la veuve,

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alors qu'elle était sur le point de s'en retourner en Irlande d'où elle aussi était venue.

C'est à Québec, dans le Bas-Canada, où il s'était rendu, sur un radeau qu'il devait y vendre, que le mariage est célébré. Dans cette ville se trouvait alors le grand marché de bois du pays, et là allaient tous ceux qui faisaient des affaires dans cette importante branche de commerce. Appelé à donner et faire connaître son domicile pour la publication des bans, Wadsworth se déclare de Québec, et persiste à conserver ce domicile dans l'acte de mariage, qui est inscrit aux régistres paroissiaux.

Son maître avait fait le bois dans la forêt, au sud de l'Ottawa, c'est-à-dire dans le Haut-Canada, et Wadsworth, après son mariage, continue les mêmes opérations durant plusieurs années sur des terres dont il n'a aucun titre, pas plus que n'en avait son prédécesseur, tout en faisant des défrichements et y édifiant une rustique habitation pour le loger lui et sa famille. Ceux de ses enfants qui décèdent durant ce laps de temps sont enterrés dans le Bas-Canada et les autres y sont envoyés à l'école.

Subséquemment, ayant vendu ses droits, quelqu'ils fussent, dans ses défrichements à un M. Egan, riche marchand de bois du Bas-Canada, Wadsworth devient *foreman* ou contre-maître de celui-ci, et continue l'exploitation pour le compte de ce dernier, tout en résidant dans le Bas-Canada où il avait transporté et établi sa famille sur une ferme ou métairie, située dans le township de Hull, qu'il avait achetée, comme il en avait fort souvent exprimé le dessein. Pendant un quart de siècle, il est demeuré sur cette propriété d'où il ne s'éloigne ensuite pendant quelque temps que pour y revenir passer le reste de ses jours, y mourir et y être inhumé, de même que l'avait été sa première épouse.

Sous de telles circonstances, est-il possible de dire que Wadsworth n'avait pas établi son domicile dans le Bas-Canada?

Comme on le voit, il s'y est marié, y a fait ses opérations de commerce, y a demeuré la plus grande partie de sa vie, y est mort et y a été inhumé avec sa première épouse.

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Lorsque ses occupations l'en tenait temporairement éloigné, il y a envoyé ses enfants pour les y faire instruire et y a fait inhumer ceux frappés par la mort. Ce sont bien là ces actes sérieux de la vie auxquels les auteurs font allusion assurément.

D'ailleurs, la présomption légale, en présence du fait que Wadsworth a été marié dans le Bas-Canada et a déclaré qu'il y était domicilié, n'est-elle pas que son domicile en effet est fixé dans cette province?

Les écrivains qui ont traité de la matière sont tous d'accord sur ce point. Pour la détruire il aurait fallu démontrer, par les actes et manifestations subséquentes de Wadsworth, qu'il avait eu l'intention arrêtée de s'établir dans la province du Haut-Canada, c'est-à-dire d'adopter un autre domicile que celui qu'il avait solennellement déclaré être le sien. Or, le contraire est prouvé, comme nous l'avons vu.

D'après moi, il n'est ni juste, ni raisonnable de décider du domicile d'une personne, tel qu'on a voulu nous le faire, par les règles reçues dans des pays où existe un tout autre ordre de choses, dans lesquels les conditions de climat, de mœurs et d'usages sont fort souvent toutes autres que les nôtres, où tout est stable et fixe en quelque sorte, tandis que dans notre pays encore jeune (mais surtout tel qu'il l'était au temps où Wadsworth commençait sa carrière), il y a encore tant de choses à l'état transitoire. Comment comparer, par exemple, les habitudes nomades d'une partie notable de notre population avec celles si sédentaires des pays du vieux monde, et serions-nous dans le vrai en appliquant les mêmes règles et aux unes et aux autres?

Ainsi dans notre pays, on ne saurait dire que ces personnes connues sous les noms si familiers à tous d'*homme de chantier*, *homme de cage*, *voyageur*, ont établi leur domicile légal là où des occupations temporaires les ont appelés et où pourtant ils demeurent très-souvent plusieurs années. Ces hommes quittent leur domicile reconnu, s'enfoncent dans la forêt, tel que Wadsworth l'a fait, y travaillent à la coupe et fabrication du bois durant plus de la

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moitié de l'année. A l'ouverture de la navigation ces bois étant mis en radeaux ou tout simplement jetés dans les rivières pour descendre au fil de l'eau sont amenés par eux au marché d'où très souvent, après le paiement de leur salaire et quelques jours de délassement, ces hommes retournent dans les bois reprendre leur travail pour le continuer ainsi durant quelque fois fort longtemps, jusqu'à ce qu'enfin, ils croient devoir retourner vers les leurs ou qu'ayant réalisé suffisamment d'argent pour s'établir définitivement, ils achètent une propriété pour s'y fixer, tel que l'a fait Wadsworth qui, après tout, n'était, jusqu'à son établissement définitif à Hull, rien autre chose qu'un homme de chantier. Cette classe d'hommes assurément ne perd point son domicile par cette absence du Bas-Canada, qui n'est que temporaire, car elle n'est censée durer que le temps qu'elle sera occupée au travail ci-dessus indiqué. En d'autres termes, ces hommes ne sont que temporairement absent et leur résidence dans les lieux où le travail les appelle n'est censé durer qu'aussi longtemps que ces occupations les y retiendront. De ce que leur engagement couvrirait une espace de sept ou huit ans, ce laps de temps ne pourrait leur constituer un domicile; encore moins si, dans toutes les circonstances sérieuses de la vie, ces hommes, tel que le faisait Wadsworth, avaient indiqué clairement par leurs actes et manifestations que leur domicile était ailleurs.

La question a d'autres aspects, mais M. le juge Tessier, mon savant collègue, les ayant traité avec une grande lucidité, il est inutile pour moi d'y revenir.

D'autres questions aussi ont été soulevées par les parties, mais je ne vois pas qu'il soit nécessaire de les aborder actuellement.

Pour toutes les raisons ci-dessus exprimées, je concours avec la majorité de cette Cour dans la confirmation du jugement de la Cour Supérieure qui déclare que Wadsworth avait son domicile dans le Bas-Canada.

Judgment confirmed.(1)

J. R. Fleming, *Q.C.*, attorney for appellant.
Barnard & Barnard, attorneys for respondent.
(J. K.)

(1) Reversed by the Supreme Court of Canada, June 22, 1886.

December 20, 1872.

Coram DUVAL, C.J., CARON, DRUMMOND, BADGLEY and MONK, JJ.

AIMÉ BÉLIVEAU
(Defendant in Court below),
APPELLANT;

AND

BENJAMIN MARTINEAU
(Plaintiff in Court below),
RESPONDENT.

Damages—Animal—Hotel-keeper—C. C. 1055.

HELD:—That a hotel-keeper, from whom a guest hires a horse and vehicle for the purpose of taking a drive, is not responsible for the negligence of his guest while driving.

The appeal was from a judgment of the Superior Court, Montreal, BERTHELOT, J., 30 December, 1870, confirmed in Review (Torrance, J., *diss.*) 30 June, 1871, maintaining the respondent's action. The judgment of the Court of first instance is reported in 15 L. C. J. 59. The text of that judgment was as follows:—

"La Cour, etc...

"Considérant que le défendeur a failli de prouver les allégués de sa défense et qu'au contraire le demandeur a prouvé que le 6 septembre dernier ainsi qu'allégué en sa déclaration, il a été frappé et renversé par terre au coin des rues McGill et Notre-Dame de cette ville par le cheval et la voiture du défendeur, conduits par une personne alors inconnue du demandeur, et ce par la faute et la négligence coupable de la personne à qui le défendeur avait confié son cheval et sa voiture, et dont il était responsable en loi, et particulièrement d'après l'article 1055 du Code Civil du Bas-Canada;

"Considérant que les dommages que le demandeur a soufferts et souffre par suite du dit accident et des bles-

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sures qu'il a reçues et de l'état de maladie dans lequel il a été, sont de la valeur de $150, a condamné le défendeur à payer la dite somme au demandeur avec intérêt de ce jour, et avec dépens comme d'une action de la Cour Supérieure."

The case was inscribed in Review by the defendant, who contended as follows:—

Qu'il avait plaidé à cette action qu'il n'était nullement coupable; que le 6 septembre dernier il avait loué sa voiture à un nommé Voyer pour aller au Sault au Récollet; que Voyer n'était ni le domestique, ni l'agent, ni l'employé du défendeur. Le défendeur prétendit que d'après le second paragraphe de l'article 1055, celui qui se sert d'un animal est responsable des dommages qu'il cause pendant qu'il en fait usage et c'est le seul qui soit applicable à cette cause. Les auteurs qui ont commenté les articles 1384 et 1385 du Code Napoléon, qui correspondent aux articles 1054 et 1055 de notre code, ne laissent aucun doute sur ce point; 2 Sourdat, de la Responsabilité: Nos. 886 et 887 etc.; 10 Pandectes françaises, p. 398; Story, Agency, No. 453; 2 Hilliard, on Torts, p. 447; 5 Larombière, Obligations, p. 785; 3 Zachariae, p. 203, No. 4; 4 Dalloz, Dict. *vo.* Responsabilité: p. 242, § 608; Sirey, 1837, 2, 508; Shearman & Redfield, on Negligence, p. 67, No. 60.

The plaintiff cited the following authorities:—

Chitty, on Carriers, p. 366; 2 Sourdat, de la Respons. p. 103, No. 782, art. 199, p. 107; 2 Toullier, p. 400, Nos. 296 et 297; 2 Favard, p. 42; 4 Merlin, p. 24; Rép., Jurisp. *vo.* Dommage, p. 692; 1 Domat, p. 474; 4 Domat, p. 196.

The majority of the Court of Review, (MACKAY, BEAUDRY, JJ.) were of opinion to confirm the judgment.

TORRANCE, J. (*diss.*):—

This is an action of damages for personal injuries inflicted upon the plaintiff by the defendant's horse in the city of Montreal. The declaration complains that on or about the 6th September, 1870, the plaintiff was crossing McGill street, in the direction of Notre Dame street, when he was thrown to the ground by the horse of the defend-

ant, driven rapidly by a person living in his house, and authorized by him to drive his horse and carriage.

The plea of the defendant denies these allegations, and alleges affirmatively that on the said day, the defendant leased his carriage to a person who was a transient traveller at his hotel, who went off with the carriage without being accompanied by the defendant, or any person in his employ or under his control, but driving the carriage himself.

The Court below gave judgment in favor of plaintiff for $150 and costs—(Berthelot, J., 30th Dec., 1870).

The evidence shows that the person doing the damage was not in the employ of the defendant, but had borrowed or leased the horse and carriage from defendant and was driving himself.

There is no question but that the defendant would have been liable for the act or negligence of his servant. Is he also liable for the act or negligence of a person not under his control or doing his work, to whom he has lent or leased his carriage and horse? An authority has been found in Bourjon, p. 504, No. III., in these words:—

"Il en est de même si le cheval est conduit par d'autres; " le maître d'icelui doit toujours réparer le dommage, ne " devant le confier qu'à celui qui peut le retenir; c'est " toujours faute, qu'il doit réparer, parce qu'on ne peut " l'imputer qu'à lui seul."

It may be said that this rule justifies the judgment under review, but I think that this *dictum* simply applies to a case of negligence or responsibility for the acts of servants or agents. The words in the note *suam suorum que culpam* would appear to indicate this.

On the other hand, the defendant has cited an authority from Rolland de Villargues *vo.* Responsabilité, No. 359, in these words: "Je vous ai prêté un cheval; tandis que " vous le montiez, le cheval d'un des cavaliers qui vous " accompagnaient se jette sur vous, vous renverse et casse " la cuisse à mon cheval; j'ai action contre celui qui mon- " tait ce cheval, s'il y a eu faute de ce cavalier, mais je n'ai " action ni contre vous ni contre le propriétaire du cheval " qu'il montait."

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This case is quite in point.

The original of this opinion, is in the Digest Lib. 9, t. 2, l. 57, and is by the Jurist Labeo. It is commented on by Accursius, with approbation, with this remark: "*cum* " *culpâ equitantis sit factum: secus si vitio equi.*" Brunnemannus, on the same passage, speaks in the same sense.

2, Sourdat de la responsabilité, in a chapter on responsibility for the acts of others, begins with the statement that, No. 750, " en principe, chacun répond uniquement de " son fait. Les fautes sont personnelles." He then treats of the exceptions, as in the case of fathers, tutors, husband and wife, principal and agent. No. 887. " Le rapport " de commettant à préposé entre deux personnes, dans le " sens de l'article 1384, du Code civil, dépend de ces deux " conditions réunies; 1o. que le préposé ait été volontaire- " ment et librement choisi; 2o. que le commettant ait le " pouvoir de lui donner des instructions, et même des " ordres sur la manière d'accomplir les actes qui lui sont " confiés. Partout où l'existence de ces deux conditions " sera constatée, on pourra dire hardiment que la respon- " sabilité existe: que si l'une d'elles vient à manquer, " la responsabilité cesse." No. 895. " Le fermier n'est pas " le préposé du propriétaire de l'immeuble. Cela n'est pas " douteux, car le louage des choses n'établit, par lui-même, " aucune subordination du preneur vis-à-vis du bailleur. " Celui-ci, à moins de stipulations particulières, n'a pas le " droit de surveiller et de diriger les opérations du fermier, " sauf en ce qui concerne la jouissance de l'immeuble et " dans son intérêt propre. . . . Ainsi, le bailleur n'est " pas responsable des dégâts causés par le fermier dans " des opérations faites même sur l'immeuble ou à raison " de l'immeuble."

Larombière, treating of Art. 1385, vol. 5, p. 785, says:— " Celui qui s'en sert (de l'animal) est pendant que l'animal " est à son usage, tenu de la même responsabilité. Il est " alors seul responsable sans que la partie lésée puisse, " dans le cas où il serait en état d'insolvabilité, exercer un " recours en garantie contre le propriétaire."

Zachariæ, Tom. 3, p. 203 (note 4), says the same thing.

Sirey, A.D. 1837, p. 508, reports the case of *Dambrouville* v. *Hennequin*, in which it was decided that "le propriétaire d'un bateau n'est pas responsable des dommages causés par ce bateau à l'écluse d'un canal, lorsque la personne qui le conduisait au moment de l'événement n'était ni son domestique, ni son préposé, mais seulement le locataire du bateau."

Broom's Maxims, p. 536 (671), treating of the rule "*respondeat superior*," remarks that the rule does not apply where the party doing the injury exercises an independent employment.

Shearman & Redfield, on Negligence, p. 67, No. 60: "No one is liable for the negligence of another person, unless the latter is his servant or agent. The owner of property whether real or personal, cannot be held responsible on the mere ground of such ownership for an injury suffered by another person from the contact of such property with his person or property. The lessor of property of any kind, as, for example, the lessor of a ferry, is not responsible for the negligence of the lessee or his servants in its management."

After the most careful consideration given to this case, I feel justified in concluding that neither under the Roman law, nor the old French and English law, nor on principle, would the proprietor be liable for the negligence or fault of the lessee or borrower in the use of his horse.

The words of our Code introduce no new rule. 1055. "The owner of an animal is responsible for the damage caused by it, whether it be under his own care or under that of his servants, or have strayed or escaped from it. He who is using the animal is equally responsible while it is in his service."

LaRombière's remark would apply as well to this article as to the article 1385 of the C. N. upon which he was commenting. The majority of the Court think that the judgment should not be disturbed, and I am obliged for the reasons I have given to enter my dissent.

The case was then taken to appeal, where the judgment was unanimously reversed.

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DUVAL, C. J.:—

We are of opinion that the judgment in this case cannot be sustained. Béliveau has been condemned in damages as the owner of a horse, which, while being driven by a person stopping at his hotel, to whom he had hired it, ran over and injured the respondent. There is no question as to the horse not being easy to manage; the animal was not under the care of any of the appellant's employees, and there is nothing to bring the case under 1055 of the Code.

The judgment in appeal is registered as follows:—

"La cour, etc.....

"Considérant que d'après la preuve faite en cette cause, il appert que le cheval appartenant à l'appelant et qui a causé le dommage dont se plaint l'intimé, était un cheval doux et tranquille et facile à mener;

"Considérant qu'il est également prouvé que ni l'appelant, ni aucun de ses employés, ni personne à son service, n'accompagnaient le nommé Voyer auquel le dit cheval avait été livré, et qui le conduisait lui-même et seul;

"Considérant que dans la circonstance, d'après la preuve et d'après la loi, le dit appelant ne peut être tenu responsable des dommages ainsi causés au dit intimé, et que, partant, dans le jugement dont est appel, savoir le jugement rendu par la Cour Supérieure siégeant en Révision, à Montréal, le 30ème jour de juin, 1871, confirmant le jugement rendu par la Cour Supérieure siégeant en première instance à Montréal le 30ème jour de décembre, 1870, il y a erreur, casse, annule et renverse le dit jugement de la dite Cour Supérieure siégeant en Révision, et procédant à rendre le jugement qui eut dû être rendu, déboute le demandeur intimé de son action avec dépens tant en première instance qu'en Révision et en Appel."

Judgment reversed.

Dorion, Dorion & Geoffrion, attorneys for appellant.
Loranger & Loranger, attorneys for respondent.

(J. K.)

November 27, 1885.

Coram DORION, C. J., MONK, RAMSAY, CROSS, JJ.

WILLIAM W. WHEELER ET AL.,
(*Defendants in Court below*),
APPELLANTS;

AND

JOHN BLACK ET AL.,
(*Plaintiffs in Court below*,)
RESPONDENTS.

Servitude—Drain—Renewal of Registration—C.C. 2172—*Interference with Servitude—C.C.* 557—*Changing condition of premises—Barn erected over Drain—Demolition.*

HELD:—1o. (Approving *La Banque du Peuple & Laporte*, 19 L.C.J. 66), that the renewal of registration of any real right, required by art. 2172 of the Civil Code, has no reference to a right in the property itself, such as a servitude of drain through a property, established by deed in favor of a neighbouring property.

2o. The proprietor of the servient land can do nothing which tends to render the exercise of the servitude less convenient than it was at the date of its creation; and so, where the owner of the servient land constructed a barn over the drain running through his land, and, in the opinion of the majority of the Court, it was proved that repairs to the drain were necessary, it was held that the person to whom the servitude was due was entitled to ask that the barn be demolished to a sufficient extent to permit repairs to the drain to be made whenever necessary.

3o. The action to enforce such servitude does not lie against a person who has ceased to be owner of the servient land before the action is instituted, but he may be condemned personally in damages if he participated in the act of obstruction.

The appeal was from a judgment of the Superior Court, Iberville, (CHAGNON, J.,) May 19, 1883, maintaining the respondents' action. The judgment was in the following terms:—

"La cour, etc.

"Considérant que les demandeurs réclament par action confessoire que le lot de terre des défendeurs désigné dans

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la déclaration, soit déclaré assujetti au profit du lot de terre des demandeurs aussi décrit dans la dite déclaration, à une servitude réelle, consistant en un droit d'égout, lequel, d'après le titre constitutif de la dite servitude, dont copie est produite par les demandeurs au soutien de leur action, consistait en le droit d'égouter par le moyen d'un canal les caves de la maison érigée sur le lopin de terre des demandeurs, maison et terrain alors en la possession du nommé J. W. Black, et lequel droit d'égout devait de plus être exercé sous une allée traversant alors le terrain acquis par les défendeurs et alors appartenant au nommé Pierre Dubeau ;

" Considérant qu'il appert par le dossier qu'un sommaire ou extrait du dit acte constituant la dite servitude a été dûment enregistrée, sous l'opération de l'ordonnance du bureau d'enregistrement ; et considérant qu'il appert par la preuve que le dit canal d'égout a de fait été construit, partant des caves de la maison en question, traversant le terrain du dit Pierre Dubeau, vendu depuis aux défendeurs, et allant déboucher dans le canal Chambly ;

" Considérant que la dite servitude, d'après les termes de l'acte créatif d'icelle en date du 22 août 1843, n'est autre qu'une des servitudes réelles dues par la chose à la chose, et n'est pas un droit ou privilége personnel, tel que les défendeurs le prétendent par leurs défenses ;

" Considérant que la dite servitude étant une servitude réelle, et donnant un droit dans la chose, *jus in re*, l'enregistrement du titre le créant, n'avait pas besoin, aux termes de l'Art. 2172 du C. C., d'être renouvelé pour conserver les effets du premier enregistrement vis-à-vis d'un acquéreur subséquent ayant enregistré son titre d'acquisition ;

" Considérant d'ailleurs qu'en supposant que tel renouvellement fût nécessaire, les défendeurs ne pourraient invoquer ce défaut de renouvellement, attendu que, aux termes de l'Art. 2098 du C. C., l'enregistrement de leur propre titre n'aurait pu leur servir dans les circonstances qu'à la condition qu'ils auraient pu démontrer que le titre d'acquisition de leur vendeur avait été enregistré, chose

que les défendeurs n'ont pas montrée ni même alléguée, et chose qui était d'autant plus nécessaire dans l'espèce que le titre d'acquisition du nommé Louis Dubeau, vendeur des défendeurs, n'était autre qu'une donation, avec caractère gratuit, dont la validité même dépendait de son enregistrement ;

" Considérant que les défendeurs n'ont prouvé que les demandeurs et leurs auteurs ont cessé d'avoir l'usage de la dite servitude pendant 30 ans ; et considérant que le contraire apparaît par la preuve ;

" Considérant que l'action des demandeurs repose sur des titres, savoir sur le titre constitutif de la dite servitude en date du 22 août 1843, ayant assujetti le lot de terre acquis par les défendeurs à l'exercice de la servitude y mentionnée, et sur le titre des demandeurs à la propriété du fonds dominant, acquisition qui, par elle-même a fait acquérir aux demandeurs toutes les servitudes actives y attachées ;

" Considérant que l'action n'est pas une action en dénonciation de nouvel œuvre, et ne repose pas sur une possession de l'an et jour du droit de servitude dont il est question, possession qui seule serait insuffisante sous notre droit pour en obtenir le bénéfice, attendu que dans notre droit, nulle servitude ne peut s'acquérir sans titre ;

" Considérant que les deux héritages dominant et servant ne doivent pas être nécessairement contigus pour qu'une servitude puisse y être légalement et utilement attachée, mais qu'il suffit qu'étant dans le voisinage l'une de l'autre, l'une puisse retirer une utilité quelconque du service foncier imposé sur l'un au profit de l'autre ;

" Considérant que la servitude ayant eu une fois son assiette fixée dans et par son titre créatif, le propriétaire du fonds assujetti ne pouvait changer l'ancien état des lieux de manière à rendre son exercice tant pour son usage que pour sa conservation et entretien, plus *incommode* ;

" Considérant que dans l'espèce il appert par la preuve que les défendeurs ont, dans l'automne 1880, érigé des constructions sur le fonds servant de manière à couvrir

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l'allée dont il était question dans le titre créatif de la dite servitude, ainsi que le canal d'égout s'y trouvant enfoui; et considérant que les défendeurs n'avaient pas le droit, dans les circonstances, de faire telles constructions à l'endroit et de la manière sus indiquée, les demandeurs se trouvant dans l'impossibilité, à raison de la dite construction, de pourvoir à la réparation de leur canal d'égout de la manière dont ils pouvaient le faire en vertu du titre créatif de la dite servitude, et de la manière dont le défendeurs devaient le souffrir en vertu du même acte ;

" Considérant qu'ainsi les objections faites par les deux défendeurs au droit d'égout des demandeurs, et susmentionnées, sont mal fondées ;

" Considérant néanmoins, quant au défendeur Coker qu'il appert par le dossier que lors de l'institution de la présente action, il avait cessé d'être propriétaire du lot de terre assujetti à la dite servitude, et que le défendeur Wheeler était le seul propriétaire en possession du dit lot de terre ;

" Considérant que la présente action étant, dans une de ses parties, une action réelle, devait être dirigée quant à ce, contre le propriétaire et possesseur d'alors du lot de terre en question ; et considérant que la partie des conclusions de la dite action demandant que le dit lot de terre soit déclaré assujetti à la servitude et que la construction y érigée fut détruite sous l'autorité de cette Cour, à défaut par le défendeur de le faire de bon gré et qu'il fût défendu au défendeur de troubler les demandeurs à l'avenir, ne pouvaient être demandée et accordée que contre le propriétaire et possesseur d'alors du dit lot de terre, et nullement contre une personne n'ayant plus alors aucun droit de propriété ni de possession sur le lot de terre en question ;

" Considérant qu'en conséquence le défendeur Wheeler seul doit subir cette partie des conclusions, étant la partie dépendant de l'action réelle confessoire, et que le défendeur Coker doit en être libéré ;

" Considérant quant à la demande de dommages-intérêts, que vis-à-vis les demandeurs, les deux défendeurs

ayant été les auteurs communs de la dite construction et par conséquent les auteurs du quasi-délit reproché, ont encouru pour et à raison de ce fait, une responsabilité solidaire vis-à-vis des dits demandeurs ; et considérant que quant à cette partie de l'action, qui est une action personnelle, les demandeurs ont pu légalement demander condamnation contre les deux défendeurs, pour la somme de dommages qu'ils ont soufferts et que la Cour est appelée à apprécier par son jugement ;

" Considérant qu'il appert suffisamment par la preuve que les demandeurs sont fondés à recouvrer des défendeurs solidairement pour et à raison des faits reprochés, la somme de $50 à titre de dommages intérêts ;

" Considérant qu'à l'encontre de ce qu'allègue le défendeur Coker dans ses défenses, l'acte constitutif de la dite servitude a été dûment enregistré par sommaire tel que requis par l'ordonnance des bureaux d'enregistrement d'alors, et considérant d'ailleurs que, quelque forme eût-elle manqué à ce sommaire, les défendeurs n'auraient pu s'en plaindre, leur propre enregistrement étant sans effet, attendu le défaut d'enregistrement du titre d'acquisition de leur vendeur Louis Dubeau ;

" Renvoie les défenses du défendeur Wheeler, et adjuge que le lot de terre acquis par les défendeurs du dit Louis Dubeau par acte du sept septembre 1880, et désigné dans la déclaration des demandeurs, est affecté et assujetti par et en vertu de l'acte passé entre le nommé Pierre Dubeau en date du 22 août 1843, allégué dans la déclaration et dûment enregistré par sommaire en octobre 1843, au droit d'égout y exprimé et de la manière et à l'endroit y mentionnés, au profit et en faveur du lot de terre acquis par les demandeurs du nommé Wise et désigné en la dite déclaration, le dit lot de terre n'étant autre que le terrain décrit au dit acte du 22 août 1843 comme étant celui alors en la possession du dit J. W. Black ;

" Et il est ordonné au défendeur Wheeler, propriétaire et possesseur actuel du dit fonds servant, de démolir et faire disparaître telle partie de la grange érigée sur icelui qui recouvre la dite allée et le canal d'égout s'y trouvant

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enfoui, dans le but de permettre aux demandeurs de faire, quand la nécessité s'en présentera, tous les travaux et ouvrages nécessaires pour la conservation du dit canal d'égout et de la dite servitude, et spécialement pour y faire actuellement les dits travaux de réparations, la preuve constatant que tels travaux de réparations y sont actuellement nécessaires, et ce dans le délai de trois semaines à compter de la signification du présent jugement, sinon et ce délai passé sans avoir fait disparaître telle partie de la dite grange, il est ordonné que telle démolition et destruction soit faite sous l'autorité de cette Cour aux frais et dépens du dit défendeur Wheeler ;

" Et la Cour autorise par les présentes les demandeurs à faire faire cette démolition dans le cas où l'éventualité sus-indiquée arriverait ;

" Et il est ordonné au défendeur Wheeler de ne plus troubler les demandeurs à l'avenir dans l'exercice de leur dit droit de servitude, tant quant à son usage qu'à sa conservation et entretien ;

" Et la Cour, quant au défendeur Coker, renvoie cette partie de l'action demandant qu'il soit restreint à reconnaître la dite servitude et à démolir la construction y érigée, mais maintient contre lui cette partie de l'action demandant des conclusions personnelles contre lui et le défendeur Wheeler ;

" Et en conséquence la Cour condamne les défendeurs solidairement, à payer aux demandeurs la somme de $50 à titre de dommages-intérêts.

" Le tout avec pleins dépens d'une contestation à la Cour Supérieure contre le défendeur Wheeler, et avec les dépens d'une action de $50 seulement contre le défendeur Coker, les dits défendeurs néanmoins, quant aux frais d'enquête des demandeurs, c'est-à-dire tous les témoins et assignation de témoins, devant en supporter chacun la moitié ;

" Et distraction est accordée des dits dépens à Mtre Girard, avocat des demandeurs ;

" Et la Cour, quant à la réponse en droit faite par les défendeurs à l'encontre de cette partie de la réponse des

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demandeurs alléguant et invoquant les titres intermédiaires de leurs auteurs, outre leur propre titre et celui créatif du dit droit de servitude ;

" Considérant que les allégations de la dite réponse ne refont point l'action des demandeurs, qui était suffisante par elle-même en reposant sur le titre créatif de la dite servitude et sur leur propre titre à la propriété du dit fonds dominant ;

" Considérant que sur l'allégation de la défense énonçant que le vendeur des demandeurs n'était pas propriétaire du fonds, les demandeurs étaient fondés à spécialiser la chaîne de leurs titres intermédiaires, et spécialement le titre de Wise père et fils, lesquels titres n'étaient pas nécessaires pour baser leur droit d'action au confessoire contre les défendeurs ;

" Renvoie la dite réponse en droit, mais sans frais."

W. W. Robertson, Q.C., for appellants :—

It is submitted on behalf of appellants that this judgment should be reversed for the following among other reasons :

1st. As to appellant Coker. As it was decided by the inferior court, he was not liable to the action *en démolition de nouvel œuvre* or *action confessoire*, because at the time of the institution of the action he was not proprietor nor in possession of the property upon which the servitude is now claimed ; therefore the judgment stands against him only for a condemnation for damages. The proof does not establish any damages, and does not even show that the construction of said barn did in any way interfere with the working of said drain, if such a drain exists. Therefore the judgment, so far as Coker is concerned, should be reversed, and the appeal granted with costs.

2nd. As to appellant Wheeler, the judgment should also be reversed—because the deed of 22nd August, 1843, creating the said servitude, was not re-registered as required by law ; and it being a real right, it was subject to the formality of re-registration imposed by our laws, in order to have any effect against third parties in good faith. And appellant submits that the distinction of the French

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law does not apply here, to wit: that it is not necessary to register the *jus in re*, but only the *jus ad rem*. The obligation of registering and re-registering real rights is established by statutory law, and our statute does not make any distinction, but says generally that all mortgages, hypothèques, charges, incumbrances, and *servitudes* upon any immovable property should be registered and re-registered. (See ch. 37, C. S. L. C.) Therefore, the default of renewing the registration of said pretended right of drain is fatal, and the servitude cannot be claimed as against third parties, to wit, the now appellants. It is also to be noticed that the property of respondents was sold five or six times, and also sold by the sheriff, and no mention whatever was made in said deeds of the existence of such a servitude.

Moreover, even supposing that this servitude exists, and is regularly registered, there is no reason or ground why the barn beneath which said drain passes, should be demolished, as ordered by the judgment of the Superior Court of Iberville. This barn does not diminish the use of the servitude or render its exercise more inconvenient, and therefore does not constitute a change in the condition of the premises in the meaning of the law.

The declaration of plaintiffs, respondents, alleges that the said barn rests on stone foundations. It is clearly proved by all the witnesses that it is built on wooden posts.

It is also proved that there is no solid floor in said barn; that the drain could be raised up and repaired in the barn just as well, if not better, as outside of the barn.

It is also in proof that appellants are willing to allow respondents to come into the said barn to raise up said drain to repair it, and appellants urge that they were never notified, before the construction of said barn of the existence of such a drain, and were never put *en demeure*, and were never asked to allow the said drain to be raised under said barn. In fact there is no proof on the part of respondents that the said drain required any repairs, or that they intended to make any repairs, and the preten-

sion of respondents seems to be that the mere fact of erecting a barn over said drain, although it does not interfere with the working and repairing of said drain, changes the condition of the premises or of the servient land, which is contrary to law. Appellants submit that in this case there is no change whatever as meant by law. The change of the condition of the premises must be such as would diminish the use of the servitude or render its exercise more inconvenient. (See Curasson, Traité des Actions Possessoires, sec. III; No. 65, pages 290 et 291, and No. 82, page 337, and following,) where the principle is laid down as to the interpretation of article 701 of C. N., corresponding to article 557 of our Code, that the change complained of must be contrary to the right of the owner of the servitude, and that it really diminishes his right. There is no such change in this cause under the proof made.

C. A. Geoffrion, Q.C., for the respondents, on the principal questions in issue, contended as follows :—

3rd Plea.—That the barn erected does not interfere with the right of servitude. In answer it is opposed, that this is contradicted by the evidence. Provost says : "Il n'y a pas moyen, d'après moi, de nettoyer cette partie du canal qui se trouve sous la grange, sans enlever cette partie de la grange qui la couvre, ainsi que ce qu'il peut y avoir dans cette grange."

Weilbrenner says : "Ce canal a besoin d'être nettoyé et réparé. Je ne sais pas à quel endroit de son parcours ce canal est enfoncé ou cassé dans la terre, non plus, qu'à quel endroit il peut être pourri : pour le voir, il faudrait en faire la levée d'un bout à l'autre, et il est tout claire que la grange en question serait un obstacle aux réparations à faire à ce canal."

The evidence of other witnesses, also shows, that the former condition of things was so changed by the erection of this large barn, that the respondents were entirely deprived of the use and enjoyment of the servitude.

The deed of Pierre Dubeau establishing the servitude conveyed the right of constructing and using a drain

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under an alley way (which served as a foot and a roadway for the occupants of all the houses of Pierre Dubeau) for the purpose of draining the cellar of the house on the dominant land; and appellants contend, that the right to preserve and repair the drain was an essential part of the right of servitude, and the obligation to allow the drain to be preserved and repaired, was an essential part of the servitude, and depriving the respondents of the right to preserve and repair the drain, was therefore depriving them of the servitude. Appellants rely upon the following authorities, to sustain these propositions:—Pardessus—Servitudes, Tome 1, p. 136, says "Que le propriétaire du fonds grevé ne peut se refuser à laisser exécuter les travaux nécessaires à l'usage de la servitude, quand même il éprouverait quelque dommage." Toullier, (Tome 3, No. 543) says, that "le propriétaire du fonds servant ne peut rien faire qui supprime l'usage de la servitude, ou qui lui préjudicie." Article 552, C. C., declares, that:—"He who establishes a servitude, is presumed to grant all that is necessary for its exercise." Article 553, C. C., declares, that:—"He to whom a servitude is due, has the right of making all the works necessary for its exercise and its preservation." Article 557, C. C., declares, that, "The proprietor of the servient land can do nothing which tends to diminish the use of the servitude or to render its exercise more inconvenient." Article 557 also provides, that the owners of the servient land may offer to the owner of the dominant land another place "as convenient for the exercise of his rights, and the latter cannot refuse it."

The appellants, so far from making any offer under this article, to allow the drain to be changed to another part of their land (if another place for the drain as convenient for the respondents could be found, which respondents do not admit) refuse to acknowledge that any servitude exists. Toullier, Tome 3:—No. 662. "Une fois l'usage et le mode des servitudes, déterminés par le titre ou par la possession, il n'est permis ni au propriétaire du fonds dominant, ni à celui du fonds servant, de rien innover à l'ancien état des lieux.

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" L'un ne peut rien faire qui tende à diminuer l'usage ou l'étendue de la servitude : l'autre ne peut faire aucun changement qui la rende plus onéreuse."

No. 663: " Celui à qui une servitude est due, a droit de faire, mais à ses frais, tous les ouvrages nécessaires pour en user et pour la conserver, et a même le droit en cas de nécessité de passer pour faire ces ouvrages sur les parties du fonds qui ne doivent pas la servitude, ou d'y déposer ses matériaux."

Dalloz (1876,—2—84.) Jugé, que " le propriétaire d'un fonds grevé d'une servitude (un droit de passage) ne peut pas faire aucun changement dans ce fonds, qui rend l'exercice de la servitude plus incommode." Demolombe (Tome 12, p. 417) : — " Le propriétaire du fonds servant, est toujours obligé en vertu de l'article 701 (art. 557, C. C.), de ne rien faire qui tende à diminuer l'exercice de la servitude, cette obligation *de ne pas faire* est, tout aussi bien que l'obligation *de faire*, dans le cas des Art. 698 et 699 (554 and 555, of C. C.) inhérente à la servitude ; donc, elle est réelle et transmissible avec le fonds servant la servitude.—C'est dans l'obligation passive, qui est imposée au propriétaire du fonds servant, de tolérer et de souffrir, et de ne faire aucun acte contraire à l'exercice de la servitude."

6th Plea :—That the alleged servitude ceased to be of any benefit to the respondents, as the Corporation of St. John's, by resolution of June 2, 1879, ordered the construction of a drain, to drain the said property of respondents, and that the new drain was constructed, and serves to drain the property of respondents better than the first drain. That, having ceased to be of any benefit to the dominant property, it has (by Art. 499, C. C.) ceased to be a charge on the servient property.

It is answered, that no attempt was made to show that such a drain had been constructed. And even if this had been proved, it would have been just as necessary to prove that this new drain was of as much benefit to the property as the first drain.

Demolombe, (Tome 12, No. 691) says :—" Sans doute,

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une prétendue servitude à laquelle le fonds dominant n'aurait aucun intérêt, serait nulle ; mais il faudrait que le défaut d'intérêt fût bien manifeste ; car, l'utilité dont parle notre article 687 (499, C. C. L. C.) doit s'entendre d'une manière très large : et il suffit que cette utilité soit apparente, éloignée, et même, seulement possible."

RAMSAY, J. (*diss.*) :—

On the 22nd August, 1843, one Pierre Dubeau, *auteur* of the appellants, sold, for $5 and the right to take some earth, to the *auteurs* of the respondents, the owners of a lot of land, number 171, "for the use of the said lot, the right of draining the cellar or cellars of said lot (*sic*) by making and passing a good drain through the lot the said Pierre Dubeau has and possesses in the said town," and "beneath alley now left open between the several houses communicating from said Front Street to said McCumming Street, to make the said drain in such way as to not injure the property of said Pierre Dubeau or his assigns," and if damage is done to pay damages. It was further stipulated that no incommodity is to arise "from the present sold privilege so as to injure the said Pierre Dubeau or his assigns and to replace the sidewalks he may injure or take away."

The declaration, after setting up the deed and having made the necessary allegations to connect the parties to the suit with those of the deed, proceeds to set forth the breach complained of. It is said, that up to the 17th September, 1880, the plaintiffs had full use and enjoyment of the privilege ceded to them, that then appellants constructed a barn covering the pathway under which the drain was constructed, that this barn covered the whole drain, that it was 100 feet long and 40 wide, and had stone foundations. The declaration further alleges :

1o. "Que les dits défendeurs ont ainsi construit la dite grange sans la permission et le consentement des dits demandeurs et sans leur offrir un autre fonds aussi commode pour l'exercice de leurs droits susdits.

2o. "Que les dits défendeurs ont ainsi changé l'état des

dits lieux en question sans la permission et le consentement des dits demandeurs.

3o. "Que les dits défendeurs en construisant la dite grange et les dites fondations de manière à traverser et couvrir comme ils l'ont fait, la dite allée et le dit canal, ont diminué l'usage des droits ci-haut mentionnés des dits demandeurs au dit passage et au dit canal, et en ont rendu l'usage plus incommode et même en ont rendu l'usage impossible.

4o. "Que les dits demandeurs sont obligés de réparer en entier de suite le dit canal, vu que des réparations à icelui sont absolument nécessaires et urgentes pour l'égoutement des dites caves de la dite maison; que pour faire telles réparations ils sont obligés de faire et faire faire des excavations considérables sur tout le parcours du dit canal, surtout sous la dite allée, mais qu'ils en sont complètement empêchés par la partie de la dite grange et les fondations d'icelle couvrant et traversant la dite allée, et ce à leur grand dommage et détriment."

By the conclusions, it is asked that plaintiffs may be declared to have a right to the servitude constituted by the deed of 1843, and then they go on to pray: "à ce que les dits défendeurs soient condamnés à démolir et enlever dans le délai à être fixé par cette honorable Cour dans et sur le jugement à être rendu en cette cause la dite grange et les fondations d'icelle, ou au moins les parties d'icelle grange et d'icelles fondations traversant et couvrant la dite allée et le dit canal et les parties d'icelle de chaque côté de la dite allée, sur une étendue suffisante pour y jeter la terre provenant des excavations nécessaires pour les réparations du dit canal et l'exercice par les dits demandeurs de leur droit d'égout, le tout conformément au jugement à être rendu en cette cause, et si non le dit délai expiré à ce que les dits demandeurs, ou toute autre personne que ce soit, soient autorisées par cette honorable Cour, en vertu du jugement à être rendu en cette cause à faire et effectuer la dite démolition de la dite grange et des dites fondations ou des parties ci-haut mentionnées d'icelle aux frais et dépens des dits défen-

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deurs dans le délai et de la manière à être fixés par cette honorable Cour dans et par le dit jugement, à ce que les dits demandeurs soient réintégrés et maintenus en la possession paisible sous l'autorité de cette Cour de leur dit droit d'égout, et à ce qu'il soit fait défense aux dits défendeurs de les troubler à l'avenir dans la dite possession de leur dit droit."

Under a very loose system of pleading, this declaration may not be demurrable, but as it is presented to the Court, and under the evidence, the pretention of respondents is that the right to put a pipe or subterranean drain under a field, to drain a neighbouring house, implies an obligation never to alter the then condition of the field, and specially not to build over the drain so that the *réparation* or refection of the drain may be impeded, and that an action will lie to demolish such building whether there be need of repairs or not.

In spite of vague or equivocal words in the declaration, it is evident by the motives of the judgment, which are very clearly put, that this was the issue the Court considered it had to deal with. It is there said :—

"Considérant que la servitude ayant eu une fois son assiette fixée dans et par son titre créatif, le propriétaire du fonds assujetti ne pouvait changer l'ancien état des lieux de manière à rendre son exercice *tant pour son usage que pour sa conservation et entretien, plus incommode ;*

"Considérant que dans l'espèce il appert par la preuve que les défendeurs ont, dans l'automne de 1880, érigé des constructions sur le fonds servant de manière à couvrir l'allée dont il était question dans le titre créatif de la dite servitude, ainsi que le canal d'égout s'y trouvant enfoui ; et considérant que les défendeurs n'avaient pas le *droit dans les circonstances, de faire telles constructions à l'endroit* et de la manière sus-indiquée, les demandeurs se trouvent dans l'impossibilité, à raison de la dite construction, de pourvoir à la réparation de leur canal d'égout de la manière dont ils pouvaient le faire en vertu du titre créatif de la dite servitude, et de la manière dont les défendeurs devaient le souffrir en vertu du même acte ;

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* * * * * *

"Et il est ordonné au défendeur Wheeler, propriétaire et possesseur actuel du dit fonds servant, de démolir et faire disparaître telle partie de la grange érigée sur icelui qui recouvre la dite allée et le canal d'égout s'y trouvant enfoui, dans le but de permettre aux demandeurs de faire, *quand la nécessité s'en présentera*, tous les travaux et ouvrages nécessaires pour la conservation du dit canal d'égout et de la dite servitude, et *spécialement pour y faire actuellement les dits travaux de réparations*, la preuve constatant que tels travaux de réparations y sont actuellement nécessaires, et ce dans le délai de trois semaines à compter de la signification du présent jugement.

* * * * * *

"Et il est ordonné au défendeur Wheeler *de ne plus troubler* les demandeurs à l'avenir dans l'exercice de leur dit droit de servitude, tant quant à son usage qu'à sa conservation et entretien."

This, then, is a judgment forbidding formally the appellants ever to build over this tube in the ground. The judgment about to be rendered, although it modifies to some extent the judgment appealed from, consecrates the same doctrine, in which I cannot concur.

The only principle invoked in support of this doctrine is, that the proprietor of the land charged shall not render the servitude less convenient than it was at its creation. This is undeniable as an exposition of a general principle; but it is not less true, that the servitude cannot be extended or exaggerated. Now, in law, what is the line of division between these co-terminous rights?

The subject of servitudes is not an easy one. It has, therefore, been examined with great care, and the principles governing these rights have been minutely described, and the principal servitudes have been named. The first of all is *de non ædificandi*. Now the doctrine is to be affirmed, that the right to put a tile drain in a field includes as an accessary, this great servitude for which $5 and a little earth has been paid. If such a doctrine exists in the law, some authority directly in point could surely have been produced. None has been produced either

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for or against this doctrine, which appears to me to be incompatible with the first principles of the law of servitudes and of the common experience of daily life. The servitude is limited by the title and what that title necessarily implies. So the right to draw water at a fountain implies the right to cross the land where it is situate in order to get to the fountain; and for a similar reason, the right to have a drain, implies the right to get at the place where it is to repair it. It does not, however, imply the much more important servitude of not building over a drain which may not require repair once in two thousand years. Drains as old as that have been found in full working order.

As to the particular case, there is no evidence that repairs are required. The only evidence attempted to be made is that respondents' cellar is damp and that water lodges there; but it is also shown that the cellar is deeper than the mouth of the drain. Respondents have no right to deepen their drain. The servitude remains as it is made.

Again, it appears that before the barn was built, the drain required repair or cleaning at the place where the barn now stands, and the ground was not dug up. I am therefore of the opinion that the judgment should be reversed, as there is no evidence that repairs are necessary, and, if necessary, that the plaintiffs are not entitled to have it declared that the building over the drain is a *trouble*.

Since this judgment was rendered, I have thought it desirable to look into the authorities to see if any could be found to support a principle so alarming as that enunciated in the judgment. The task is more tedious than difficult. Servitudes come to us almost unaltered from the Roman law, and Lalaure has made a compilation of 1,029 texts from the *corpus juris* relating to them. These I have examined carefully, and there is not one that sustains the doctrine now laid down by the Court. It cannot be said that any one directly contradicts it, for it does not appear

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to have occurred to any writer or litigant that such a doctrine could be advanced; but several texts are incompatible with the existence of such a doctrine. To deal with the subject in an orderly manner it may be useful to recall some general principles alluded to in the opinion in dissent.

(1) The owner of a servitude cannot augment the servitude as established. Dig. viii, t. 1, l. 9 (2) Nor can the owner of the land charged do anything to interfere with the exercise of the right. Dig. viii, t. 2, l. 20, §§ 2, 3, 4, 5 and 6; and so a proprietor cannot build where he has ceded a right of way. Dig. viii, t. 5, l. 9. etc. (3) The owner of the servitude has impliedly all that is necessary to its enjoyment. Dig. viii, t. 3, l. 3, § 3. Therefore (4) the owner of the servitude has a right to repair canals and drains. Dig. 39, t. 1, l. 5, § 11, Lalaure, 477. Dig. 43, t. 23, l. 1, pr. Lal. 827. And streams. Dig. 43, t. 21, l. 4. Lal. 814. And may pierce the wall of his neighbour's house and raise the pavement to make repairs. Dig. 43, t. 23, l. 1, 12. Lal. 839. Giving security, Lal. 841. All subterranean drains are included. Lal. 792, *quid sit reficere, Dic, reficere est rem ad pristinum statum reducere; hoc est, ne quis dilatet, aut producat, aut exaggeret.* Cæpolla, tr. 2 de servit., cap. LIX, 1. (5) Can it be assumed that when there is a special mention of the prohibition to build over a right of way, that if there had been a prohibition to build over a right of subterranean drain, it would have passed unnoticed? It was not that the rights as to running water were overlooked, for not only is the owner of the subject land forbidden to build over the right of way, but he is equally forbidden to build so as to prevent the right of gutter. Dig. viii, t. 5, l. 9. Again, the idea that the owner cannot build over a subterranean drain is incompatible with the laws as to the cleansing of sewers.

In addition to this, a curious legal difficulty bears on this question. The right to prevent any one building on a right of way seems to be contradicted by another law: "*Qui viam habet, si opus novum nuntiaverit adversus eum qui in viâ ædificat, nihil agit, sed servitutem vindicare non prohibetur.*"

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Dig. t. 39, l. 1, 14. The contradiction between this text and the one already cited (Dig. viii, t. 5, l. 9) naturally has given rise to considerable controversy. (See Merlin, Den. de N. O., p. 140, Pothier, Pand., Bréard-N. 15, p. 500.) Pothier, following Cujas, adopts the view that the latter law only applies to such new works as indirectly affect the use of the servitude. (Ib. and Cujas 10, 118 C.) If this be correct, it seems incontestable that the latter law is an imperfect fragment and that, if entire, it would meet exactly the case of repairs or occasional use. Being so interpreted it is decisive against the principle of the judgment in this case. Caepolla gives a form of the action to remove an impediment to the repair or cleansing of a sewer, and the defendant's answer, from both of which it appears that the impediment need only be removed when the plaintiff requires to repair, and for the purposes of repair. Tr. II, cap. VI, 7 and 8.

Under the modern French law there does not seem to be any change from the old law in this respect. Mr. Laurent, with his accustomed vigour, builds his doctrine on the C. N., but his conclusions do not seem to add much to the doctrine of the Roman law. Whether interpretation is to be strict or broad is little more than a question of degree in most cases. As regards servitudes, it has never been questioned that the greater right implies the minor, or that the necessary accessary (called by Mr. Laurent, with questionable exactitude, the "*servitude accessoire*") follows the principle by implication.

Our code has followed the old law of servitudes without deviation, except in two articles (821 and 532, § 3.) Neither of these modifications alters the general principles of servitudes. They merely affect details.

DORION, C. J.:—

The majority of the Court are of opinion that the judgment is in conformity to law, and should be confirmed. The Blacks say, you have built over our drain, and we wish to repair it. In answer to this, Wheeler pleads, first, your right to have a drain there has not been re-

registered as required by law. This Court decided in the case of *La Banque du Peuple & Laporte*, that the registration of a title does not require to be renewed. This pretension of appellant is, therefore, unfounded. The next question is whether the appellant had a right to put up a building over the drain. The person to whom a servitude is due, whether it be a right of way over, or a right to have a drain through, a neighbour's land, is entitled to enjoy it without impediment. The proprietor of the servient land cannot diminish its use or render its exercise more inconvenient. It is shown by the evidence that repairs are necessary, and the respondents cannot get at the drain to repair it. We think, therefore, that the respondents are entitled to ask that the barn be taken down so as to enable them to make repairs to their drain. But as it may not be necessary to take down more than a small portion, we modify the judgment so as to make this more explicit, and to prevent the appellant from being put to greater inconvenience or expense than can be avoided in order to repair the drain.

As to Coker, I would be disposed to say that there should have been no damages allowed against him. He had ceased to be proprietor before the action was instituted, and no damages appear to have been suffered, but we do not reverse the judgment on this head, as the amount is nominal.

MONK, J.:—

I need not say more than that I entirely concur in the reasons which have been stated by the Chief Justice, and I am at a loss to understand how any other view can be taken of the case.

The following is the text of the judgment in appeal:—

"La Cour, etc:—

"Considérant qu'il n'y a pas mal jugé dans le jugement rendu par la Cour Supérieure siégeant à St. Jean, dans le district d'Iberville, le 19 d'avril, 1883, et dont est appel, confirme le dit jugement avec dépens contre les appelants, en faveur des dits intimés, avec la modification suivante, savoir: Il est ordonné au défendeur Wm. W. Wheeler, l'un

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des dits appelants, propriétaire et possesseur actuel du fonds servant désigné dans la déclaration, de démolir et faire disparaître telle partie de la grange érigée sur icelui qui recouvre l'allée dont il est question dans le titre créatif de la dite servitude, et le canal d'égout s'y trouvant enfoui, jusqu'à une hauteur suffisante pour permettre aux demandeurs de faire, quand la nécessité s'en présentera, tous les travaux et ouvrages nécessaires pour la conservation du dit canal d'égout, et de la dite servitude, et spécialement pour y faire actuellement les dits travaux de réparations, la preuve constatant que tels travaux de réparations y sont actuellement nécessaires, et ce, aussi commodément qu'ils auraient pu le faire d'après l'état des lieux lorsque la dite servitude a été imposée par l'acte du 22me jour d'août 1843, ce qui sera établi par experts, si les parties ne peuvent s'entendre; et ce, dans un délai de trois semaines à compter de la signification du présent jugement, ou tout autre délai qui sera fixé par la Cour Supérieure, sinon, et ce délai passé, sans avoir fait disparaître telle partie de la dite grange, il est ordonné que telle démolition et destruction soit faite sous l'autorité de la Cour, aux frais et dépens du défendeur Wheeler;

"Et il est ordonné au dit défendeur Wheeler (appelant) de ne pas troubler les demandeurs intimés à l'avenir dans l'exercice de leur droit de servitude, tant qu'à son usage qu'à sa conservation et entretien;

"Et la Cour, quant au défendeur appelant Edward C. Coker, renvoie cette partie de l'action demandant qu'il soit restreint à reconnaitre la dite servitude et à démolir la construction y érigée; mais maintient contre lui cette partie de l'action demandant des conclusions personnelles contre lui, et le dit Wm. W. Wheeler;

"Et en conséquence, la Cour condamne les défendeurs appelants à payer aux demandeurs intimés la somme de $50 à titre de dommages intérêts." (*Dissentiente* l'Hon. M. le juge Ramsay).

Judgment confirmed.

Robertson, Ritchie & Fleet, Attorneys for Appellants.

Geoffrion, Dorion, Lafleur & Rinfret, for Respondents.

(J. K.)

[IN CHAMBERS].

January 7, 1886.

Coram CROSS, J.

WILLIAM W. WHEELER ET AL.,

APPELLANTS;

AND

JOHN BLACK ET AL.,

RESPONDENTS;

AND

THE SAID APPELLANTS,

PETITIONERS FOR LEAVE TO APPEAL.

Appeal to Supreme Court—Future rights—Servitude—Security.

HELD:—1. That a question of servitude is a question involving future rights within the meaning of sect. 8 of the Supreme Court Amendment Act of 1879.

2. That on an appeal to the Supreme Court of Canada personal security is sufficient.

The judgment of the Court of Queen's Bench rendered on the 27th Nov. 1885, declared certain property of the appellant Wheeler subject to a servitude, *droit d'égout*, in favor of a property of respondents, and ordered the appellant to demolish a portion of a barn built on the servient property over the drain to a height sufficient to allow plaintiffs to perform when necessary all the work necessary for the preservation of the *canal d'égout* and the servitude.

The appellants petitioned for leave to appeal to the Supreme Court, and offered sureties who justified to the amount required, but not on real estate.

The respondents opposed the petition on the grounds:

1. That a question of servitude as in the present case is not a future right within the meaning of section 8 of the Supreme Court Amendment Act of 1879.

2. That the giving of security is a matter governed by

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Quebec law; that under Art. 1989 C. C. the sureties must justify on real estate, and that this rule is applicable to appeals to the Supreme Court in the absence of any specific provision in the Supreme Court Act that personal security shall be sufficient.

After consultation with the other members of the Court, the honorable Judge allowed the appeal on the security bond offered.

Robertson, Ritchie, Fleet & Falconer,
L. G. Macdonald, } for petitioners.

Geoffrion, Dorion, Lafleur & Rinfret, for respondents.

(J. K.)

March 27, 1886.

Coram MONK, RAMSAY, TESSIER, CROSS & BABY, JJ.

HENRY MACFARLANE
(*Plaintiff in Court below*),
APPELLANT;

AND

THE CORPORATION OF THE PARISH OF ST. CÉSAIRE
(*Defendant in Court below*),
RESPONDENT.

Municipal Debentures—Conditions—Municipal Code, Art. 982.

A debenture is a negotiable instrument, and cannot bear a condition on the face of it, making its validity dependent upon obligations to be performed in future. And so, where a municipal corporation voted a bonus to a railway company payable in debentures, and the by-law imposed certain future obligations upon the Company as to the mode of operating the road, it was *held*, that debentures in which these obligations were set forth as conditions were not a valid tender.

The appeal was from a judgment of the Superior Court, St. Hyacinthe (SICOTTE, J.), dismissing the action. The question is fully stated in the opinions.

O'Halloran, Q.C., for the appellant.

Laflamme, Q.C., for the respondent.

BABY, J. (*diss.*) :—

Je regrette de ne pouvoir concourir dans le jugement de cette Cour.

Aux termes de la loi, les corporations municipales ont le droit de venir en aide aux chemins de fer dont la construction peut leur être avantageuse, et c'est ce qui a eu lieu dans le cas actuel. La Municipalité de la paroisse de St. Césaire a accordé un aide de $20,000 à la compagnie "*The Montreal, Portland and Boston Railway Company*," tout en mettant certaines conditions à sa libéralité dans l'intérêt des contribuables.

En vertu de l'art. 981 du Code Municipal, tout bon ou débenture municipal doit mentionner :

1o. Le nom de la corporation au nom de laquelle il est émis ;

2o. Le règlement en vertu duquel il est émis ;

3o. Le montant pour lequel il est donné ;

4o. Le taux de l'intérêt payable par année ;

5o. Le temps et le lieu du paiement tant des intérêts que du capital ;

6o. La date de son émission.

L'art. 982 ajoute qu'il "doit contenir, en outre, toute "disposition nécessaire à la mise à effet des intentions du "règlement en vertu duquel il est émis."

Les débentures dont il est ici question portent à leur face tout ce que la loi exige qu'on y trouve et surtout les conditions ou "*dispositions nécessaires à la mise à effet des intentions du règlement en vertu duquel elles sont émises*," et c'est à quoi l'appelant, cessionnaire de la compagnie ci-dessus nommée, s'oppose : il les veut avoir sans que les conditions imposées par le conseil local de St. Césaire dans son règlement et ratifiées par les contribuables de la municipalité y apparaissent.

Cette prétention, d'après moi, est mal fondée, en contradiction expresse avec la loi.

Un conseil municipal n'a pas plus de pouvoir que la loi lui en accorde ; cela est indiscutable, je crois. Or, elle décrète que si celui-ci émet des débentures, elles le seront de la manière et en la forme qu'elle indique tout parti-

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culièrement. Peut-on alors dire qu'un conseil qui s'est ainsi soumis à la loi a erré, sous prétexte qu'une débenture est, en soi, un effet négociable et ne peut, en conséquence, être sujet à aucune condition? Je ne puis me rendre à cette manière d'interpréter notre loi municipale. Elle veut bien que les corps municipaux se prêtent aux ouvrages d'un intérêt public, mais elle veut aussi que les contribuables ne soient pas trompés, non plus que les tiers porteurs de ces mêmes débentures, et delà ses exigences si sages. Quand la compagnie sus-nommée a accepté l'aide en question, sous forme de débentures, elle savait bien quelles en seraient les conditions, car elles avaient été réglées par le conseil de la Paroisse de St. Césaire et puis ratifiées formellement par les contribuables de la paroisse. Le demandeur appelant ne pouvait non plus ignorer que les débentures qu'il acceptait de son cessionnaire étaient des *débentures municipales*, c'est-à-dire, faites en la forme voulue et rigoureusement exigée par le code municipal; il n'y a donc ici aucun préjudice.

La Cour de première instance l'a ainsi jugé, et je ne puis découvrir aucune raison légale qui puisse faire infirmer ce jugement, ainsi que la majorité de ce tribunal est disposée de le faire. Je dois donc entrer mon dissentiment.

CROSS, J.:—

The appellant brings suit against the parish of St. Césaire for the recovery of 200 municipal debentures of $100 each, with interest coupons attached, which he claims to recover under the following circumstances:— On the 6th December, 1880, the Council of the parish of St. Césaire passed a by-law granting a bonus of $20,000 in aid of the Montreal, Portland & Boston Railway Company, to engage them to make a branch of their road from the station at Ste. Marie de Monnoir, or Marieville, to St. Césaire. The by-law was approved of by the electors and sanctioned in due course by the Lieutenant-Governor.

It was therein provided that the bonus was to be paid in debentures of $100 each, with semi-annual interest

coupons attached, the capital payable in twenty-five years. It was further therein declared that the debentures should not be delivered to the Company until—

1. The branch from Marieville to St. Césaire should be in operation;

2. That all claims under a former by-law should be relinquished;

3. The railway station should not be distant more than ten arpents from the church at St. Césaire;

4. The rates of fare should not exceed those on other portions of the line.

Unless the branch were constructed before the 1st of January, 1883, the by-law was to become null and void. The Company were to keep the road in operation, and not less than two trains a day were to be run between St. Césaire and Marieville.

The road was duly completed within the specified time, and all the conditions precedent stated in the by-law to the issuing and delivery of the debentures complied with by the Company. The keeping of the road in operation, the number of trains to be run daily and the future rate of freight, did not apply as conditions precedent. The debentures therefore became deliverable antecedent to these conditions coming into operation.

The appellant was contractor for the building of the railroad, and, as part payment for his work, the Railway Company transferred to him their claim for the bonus so voted by the Council of St. Césaire.

The respondents pleaded a tender of debentures which they had made on the 11th of June, 1884, being of the requisite number and to the amount then due, with sufficient money to cover costs and interest not represented by coupons. They consequently, repeating their tender in Court, asked it to be declared valid and appellant's action dismissed.

The bonds tendered contained a declaration to the effect following. The condition of this debenture is—

1. That the said Railway Company shall maintain in operation a branch of the said railway from the village of

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St. Césaire to a station of the said Company at or near Marieville, shall run at least two trains a day each way to and from St. Césaire, said trains to connect with the trains passing at Marieville;

2. The Railway Company will not charge a higher rate for fare of passengers or for freight shipped from or received at St. Césaire to or from any place beyond Marieville than the rate charged, or to be charged, from Marieville to Montreal and the United States in proportion to the number of miles travelled;

3. The station of the said railway shall be within ten arpents of the Catholic church of the village of St. Césaire.

The plaintiff (appellant) refused to accept the debentures with these conditions.

The respondent contended that he had a right to exact their insertion in the debentures in virtue of the provisions in the by-law and Art. 982 of the Municipal Code, more especially as the Railway Company had become insolvent and the parish of St. Césaire could not otherwise have any security that the conditions they made with the Company in regard to the future would be fulfilled.

The Superior Court adopted the respondent's views, held the tender of the debentures in the shape offered sufficient, and dismissed appellant's action. The contractor now appeals.

The case is extremely embarrassing. It is obvious that the by-law did not impose as a condition of the issue and delivery of the debentures, the performance of the undertakings to be observed in future after the completion of the road.

Two sets of conventions were contemplated by the by-law; one set were conditions precedent to the delivery of the debentures. These were all performed. In terms of the by-law the debentures were not to be delivered until these conditions had been fulfilled. They were all fulfilled before the debentures were asked for. The other set of conventions to be performed in future were to be

fulfilled after the delivery of the debentures. In respect to them the by-law attached no conditions to affect the debentures. Debentures, as commonly understood and according to the general usage, are negotiable instruments transferable by endorsement or by mere delivery. They are usually given in payment of the work of construction, and were so intended to be given in this case in aid of the construction of any railroad or public work, according to Art. 479 Municipal Code, and not to be conditioned on the performance of future obligations. There is nothing in the by-law to indicate that the respondents would have a right to place restrictions on their payment to guarantee the future keeping up of the road. For that they would naturally have to depend on the liability of the Company on its personal undertaking, seeing that the debentures would have to pass as money to pay for the construction of the road; and if this restriction were placed upon them it would practically render them almost valueless, their negotiability being dependent on conditions which the debenture holders could not be expected to undertake and which to them would be next to impracticable.

If, therefore, the insertion of these conditions were not required by the by-law, were the respondents justified in inserting them by reason of the provision of Art. 982 of the Municipal Code, which is in the words following:— "It must further contain all provisions necessary to carry "into effect the intent of the by-law in virtue of which it "is issued." It is naturally argued that this imperative statutory requirement cannot be dispensed with, and that the intent of the by-law was not only to obtain a branch railroad but to secure its future running at moderate rates of freight. There is much force in this reasoning; at the same time it is very evident that the value of the debentures was earned by the railway and its contractor, and due, irrespective of such condition as precedent to their delivery according to the terms of the by-law, therefore they could not be inserted as binding conditions affecting the amount to be paid under the debentures, and if inoperative in this respect their insertion in any shape would

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only have the effect of casting doubt on the absolute nature of the obligation in the debentures, and thereby greatly impairing their value as negotiable instruments, which the municipality has no interest in doing. They cannot be inserted as conditions, because they were not made so by the by-law. Are they provisions without being conditions? If so, they are of no force, and their insertion would be without benefit and pernicious. Added to this, the Municipal Code in its appendix gives a complete form of a municipal debenture without reference to any such provisions. The article cited is vague in its terms, and may be sufficiently complied with by mention of the fact that the bonus is granted to aid in the construction of the particular branch railroad in the terms they are authorized by Art. 479 of the Municipal Code, which may be said not to contemplate keeping a railroad up in future.

We are of opinion that the municipality of St. Césaire had no right to insert as conditions, in the debentures which they tendered to the appellant, the provision therein contained for the keeping up in future of said branch railroad and regulating its rates of freight, and that all the conditions precedent to the delivery of the debentures having been performed, the appellant, as transferee of the rights of the Railway Company, is entitled to recover the debentures in form and tenor free from conditions and in the shape of absolute obligations in form negotiable. Therefore the judgment dismissing appellant's action must be reversed, and the parish of St. Césaire ordered to deliver over to the appellant debentures free from said conditions, subject of course to the deduction allowed in the Court below for the amount attached under the *saisie-arrêt* at the suit of Bombardier, a creditor, who had placed an attachment with the municipality, taking rank before the assignment to the appellant of the right to the bonus.

RAMSAY, J.:—

The Municipal Corporation of St. Césaire voted a sum

of money to a railroad company, which was to be paid in debentures. These debentures were not to be given till the road is in running order, and until several other things were performed. All these stipulations were fulfilled; but the by-law stipulated also future obligations—that the road was to be kept open—that there should be two trains a day, and that the rate of passage and freight should not exceed a certain amount.

When the municipality was asked to give the debentures they tendered them charged with all these future conditions. The appellant, who stands in the place of the company, brought his action for debentures freed from all suspensive conditions. The Superior Court declared the debentures offered to be sufficient.

There are legal questions which, if they have no other merit, exhibit, at all events, the ingenuity of the proposer. This is one of them. The respondent admits that the debentures are due since he affects to tender them, but what he tenders is not a debenture at all; it is only an acknowledgment of a conditional indebtedness. A debenture is a negotiable instrument in the nature of a promissory note, and therefore, it cannot bear a condition on the face of it. There is a form of debenture given by the statute which shows clearly that the intention of the legislature was not to call an instrument a debenture which should be so only in name.

The argument used in support of the judgment is this: Art. 982, Municipal Code, says, "it (the debenture) must "further contain all provisions necessary to carry into "effect the intent of the by-law in virtue of which it is "issued," and therefore the undertakings as to the future obligations of the railway company must appear on the face of the debenture.

It does not appear to me that this is the proper interpretation of the article. The intent of the by-law is the construction of the railway in a certain manner. The mode in which it shall be worked is not the immediate intent of the by-law, and therefore it is not a provision which should appear on the face of the debenture. In

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the second place, if it were necessary to put these stipulations on the face of the debenture, there is nothing in the article to authorize the Court to say that these "provisions" shall be "the condition of this debenture."

It must be evident that if the decision of the Court below were maintained, not only the debentures would be valueless as securities; but the $20,000 subscribed by this municipality could never be recovered. I am to reverse.

The following is the judgment of the Court:—

"The Court, etc.

"Considering that the debentures tendered by the respondents to the appellant, as specified in the plea of the latter, and as produced by them in this cause, contain certain conditions therein inserted to the effect following, to wit:

1. That the said Railway Company shall maintain in operation a branch of the said railway from the village of St. Césaire to a station of the said company at or near Marieville—shall run at least two trains a day each way to and from St. Césaire, said trains to connect with the trains passing at Marieville;

2. The Railway Company will not charge a higher rate for fare of passengers or for freight shipped from or received at St. Césaire to or from any place beyond Marieville than the rates charged, or to be charged, from Marieville to Montreal and the United States in proportion to the number of miles travelled;

3. That the station of the said railway shall be within ten arpents of the Catholic church of the village of St. Césaire;

"Considering that by the by-law passed by the council of the said parish of St. Césaire, cited in the pleadings in this cause, there is no provision to the effect that said conditions were to be inserted in the debentures to be issued in virtue of said by-law, nor that they were in any manner imposed or to be imposed as conditions precedent to the issuing or delivery of said debentures;

"Considering that said debentures were intended to be

and were in their nature negotiable instruments payable absolutely and without condition;

"Considering that respondents had no right to impose said conditions in said debentures, and were bound to deliver to appellants debentures free from said conditions;

"Considering, therefore, that there is error in the judgment rendered in this cause by the Superior Court sitting at St. Hyacinthe on the 11th of December, 1884, the Court now here doth reverse, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth overrule and dismiss the pleas of the respondents, and doth order that within fifteen days after the service upon them of this judgment, the said respondents do deliver to the appellant 200 debentures of the said Corporation, each for the sum of $100, etc."

Judgment reversed, Baby, J., *diss.*

O'Halloran & Duffy, attorneys for appellant.

Laflamme, Huntington, Laflamme & Richard, attorneys for respondents.

(J. K.)

March 22, 1886.

Coram DORION, C. J., MONK, RAMSAY, TESSIER, CROSS, JJ.

HARTLAND S. MACDOUGALL ET AL.,
(*Plaintiffs in Court below,*)
APPELLANTS;

AND

GEORGE DEMERS,
(*Defendant in Court below,*)
RESPONDENT.

Fictitious Contracts—Stock transactions—Settlement by payment of differences—C. C. 1927*—Broker—Principal and Agent.*

1o. Time bargains are not necessarily illegal, nor does the law refuse to enforce them, if they are made for serious transactions intended to be fulfilled, although it may happen, contrary to the expectation of the parties, that they are not really carried out as contemplated, but from unforeseen causes come to be settled by differences. But if, in contemplation of the parties, they are at their inception intended to be speculative transactions, to be settled by adjustment of prices according to the rise or fall of the market, and not by delivery of the subjects bought or sold, they become gambling transactions, and, under C.C. 1927, there is no right of action for the recovery of money claimed thereunder.

2o. Where brokers act for a person contracting as above to deliver grain at a future date (but without intention to make actual delivery), and the brokers, having full knowledge of the fictitious character of the transaction, disclose no purchaser or principal, they will be considered principals as regards the party contracting to deliver, and no action will lie by the brokers for the recovery of a deficiency upon the transaction.

The appeal was from a judgment of the Superior Court, Montreal, (LORANGER, J.), Dec. 3, 1883, in the following terms :—

"La Cour, etc :—

"Considérant que le montant réclamé en cette cause par les demandeurs, serait dû pour avances qu'ils auraient faites comme agents du défendeur dans certaines transactions de bourse consistant en achats de parts dans des compagnies de chemin de fer ou autres industries commerciales dans la Puissance du Canada, et de grains aux Etats-Unis ;

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"Considérant que le défendeur a plaidé que le contrat intervenu entre les parties n'avait pour objet que des opérations fictives fondées sur des valeurs et effets imaginaires ; que les dettes contractées par suite de ces opérations sont des dettes de jeu ; que les transactions en question étaient des marchés à terme par lesquels aucune des parties n'était tenue à la livraison des effets achetés, et qui devaient se résoudre entre eux dans le payement de la différence entre le prix d'achat et celui de la revente, et qu'elle ne constituait qu'un jeu sur la hausse ou la baisse, et que le tout n'était qu'un contrat de jeu prohibé par la loi, pour lequel les demandeurs n'avaient aucun recours en justice ;

"Considérant que le défendeur a prouvé les allégués de sa défense ; que les transactions intervenues entre les demandeurs et lui, n'ont été qu'un jeu de bourse, et que le contrat sur lequel repose la présente action est prohibé par l'article 1927 C.C. ; que malgré que dans toutes ces transactions les demandeurs n'aient été que les mandataires du défendeur, cependant ce mandat repose sur une cause illicite et contraire aux bonnes mœurs, et les demandeurs sont sans droit à réclamer aucune somme d'argent en vertu du dit mandat ;

"Considérant que les demandeurs n'ont pas prouvé les allégués de leur déclaration ;

"Renvoie l'action des dits demandeurs sans frais."

The action in which the judgment above cited was rendered, was by brokers against a principal (the respondent) for $1,239.99, money laid out and expended, etc., and commissions on stock and corn transactions in Montreal, New York and Chicago.

The case in appeal was twice argued ; first, on 17th and 18th September, 1885, before Dorion, C. J., and Monk, Ramsay and Cross, JJ. A re-hearing was ordered, which took place before Dorion, C. J., and Monk, Ramsay, Tessier and Cross, JJ., on the 21st, 22nd and 26th January, 1886.

Hon. R. Laflamme, Q. C., and *John Dunlop*, for Appellants.
Jodoin and *J. N. Belleau*, for Respondents.

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RAMSAY, J. (*diss.*) :—

This is an action by a broker and commission merchant, to recover from defendant, his principal, the sum of $1,239.99, on certain transactions in grain.

To this action the defendant pleaded specially: (1) That the operations were fictitious and simulated, and that the debts contracted were gambling debts, which could not be recovered by action; that there was no obligation to deliver, but only to pay a difference, and the contract was gambling or wagering; that the goods were not delivered to defendant; that they were never in the possession of plaintiff, who was not in a position to fulfil his contract; that the plaintiffs sold without authority, and were guilty of gross negligence, and must suffer any losses sustained: (2) It is pleaded that the defendant neither authorized the purchases nor the sales.

The pleadings are completed by a *défense en fait*.

In a breath, then, the defendant says: "I made a contract with you exactly as you say I did; but it was illegal and void; I had transactions with you, but I never authorized you to buy or to sell, and you mismanaged my affairs; and lastly, I never contracted with you at all."

It is not necessary in this case to enter upon the question as to how far the rule expressed by the *brocard* "*qui excipit non censetur confiteri*" goes, or how far it is affected by article 144, C.C.P.; or whether it rests on the same principle as the indivisibility of the *aveu*, or is co-extensive with it or related to it in any way. It will, however, scarcely be questioned that the existence of a special exception admitting a transaction will tend to give credibility to evidence of the existence of the transaction. Taking this view, three questions present themselves:—1. Is the authority of appellants to buy and to sell established? 2. If established, is the contract shown to be other than it purports to be, one on which no action will lie? 3. If the original contract was gambling, would this affect the collateral contract between a gambler and a non-gambler?

At the first argument here appellants' lack of authority was not very seriously urged, except as to its extent, and

how far they were justified in purchasing to cover themselves. The authority is fully admitted at page 7 of respondent's factum. Indeed,it was too clear to be decently denied. At the second argument, it was also in words admitted that in transactions of this sort—that is, on sales for future delivery, carried on by what are called margins, that is by an amount to cover the loss by rise or fall in the price of the article, the power to buy and the power to sell stand on the same footing. It seems to me it would be a mere quibble to pretend anything else in face of the uncontradicted testimony produced by appellants. This was evidently the view taken by the judge in the court below. It would have been very easy for him, if he thought so, to say there is no evidence that Demers authorized the Macdougalls to buy for him. But he could not say that, and he dismissed the action because a *jeu de bourse* was disclosed. The judgment in the court below then implies a contract proved. However permissible it may be to plead in the same suit (1) I never transacted with you at all, and (2) our transactions cannot be subject of a suit, for the law has taken away the right of action, it is manifest that evidence to support both of these pretentions is impossible. The evidence of the existence of a transaction, whether a *jeu de bourse* or otherwise, knocks the general issue out of court, whatever may be its value as a mere question of pleading.

We therefore come to the two exceptions, which are so mixed up they may be examined together, and their matter may be held to present the second question, namely, is the contract one which the law discourages so far as to refuse the parties to it right of action?

In order to keep the real question perfectly clear of all the sensational matter that may possibly be wound up in the public mind relative to a case indirectly affecting large interests, I may say,that if it appeared that a contract, seeming to be one of ordinary purchase and sale, was simulated so as to cover a bet on the rise and fall of prices of produce or stocks, I should unhesitatingly declare that no action would lie between the parties to the bet. And so it has

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been held in France. See Sirey, Code civil annoté, art. 1695, notes 3, 4 and 5.

Is there any such evidence in this case? The learned judge in the Court below has evidently adopted as a presumption *juris et de jure*, that a sale for future delivery on a margin is a *jeu de bourse*, and therefore that it is gambling. I know no law for this, and it seems to me to be a totally gratuitous presumption, that a man may not carry on his business with the vendor on the same principle he carries it on with the bank. That is, in both cases he is either trusted or he furnishes security. Who ever heard that it was essential to a bargain of sale that the purchaser should have money and the vendor the article? In France, it has been held that the price in the hands of the broker of the purchaser is not indispensable for the validity of the bargain. Sirey, on the article quoted, note 6. Also, that bargains *à terme*, in view of profits to be realized by the variation of prices of goods, do not necessarily imply a legal presumption of betting. (*Ib.* 7.) Nor is a wager to be presumed because the price was not paid, and no delivery made (*Ib.* 9); nor because the bargain is *à prime* (*Ib.* 10); nor will it be presumed to be a wager from the fact alone that the price was settled by the payment of a difference (*Ib.* 11).

Is there anything in the transaction before us to give a special significance to the facts mentioned? The respondent has not attempted to show any. He examined Mr. Macdougall, who answered point blank that it was at the option of the respondent to have had the bargain effectively carried out. Mr. Demers says that he is not to be believed in this, and that it was only a bet on rise and fall. But the testimony of Mr. Macdougall supports the contract, that of Demers is against it. Again, we are told we are to presume that the contract was simulated because there were many transactions between appellants and respondent, and in none of them was there ever a delivery. This is an excellent specimen of a *non sequitur*. (1) Ninety-nine illegal contracts will not establish that the hundredth is illegal, just as evidence of a man stealing ten

loaves of bread will not prove that he didn't buy the eleventh. (2) It is not proved that the other contracts were simulated because there was no delivery, as has been already said of this one. The logical conclusion then to which respondent seeks to lead us amounts to this : "You must accept as proof of fraud in this case, the existence of other similar cases, in which fraud is not proved." See note 11, Sirey on art. 1695, C.N.

It is quite possible that a great deal of gambling may be carried on under simulated contracts of sale, but the question we have to decide is whether it has been proved that this is one of them. Again, if it be determined to put an end to the possibility of making gambling contracts in this way, the legislature has only to declare that sales for future delivery can only be made between parties who have got the article, the existence of which is guaranteed by that faithful voucher—a warehouse receipt, and the money in a bag.

We now come to the third and last question, namely, whether, supposing this contract by Demers to be in violation of article 1927 C.C., Demers' agents cannot recover back a commission that they paid for him in carrying out his instructions.

Taking that article as expressing the old law, it does not go so far as to say that the person who pays a gambling debt for another shall not recover from the principal the amount that he has so paid. This is not "claimed under a gaming contract or a bet."

There can be no doubt that if money be advanced for an immoral or an illegal purpose, or even with an object which, under the circumstances, is improper, as Pothier says, Mandat No. 8, the money cannot be recovered back by the lender. But in order to bring the case of a gambling debt within this rule, it is necessary in the first place to show that a gambling debt is either immoral, illicit or, under the circumstances, improper. The English statute 8 & 9 Vic., ch. 109, contains a disposition very similar to our article 1927 C. C. It is as follows : "All contracts or "agreements, whether by parole or in writing, by way of

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" gaming or wagering, shall be null and void, and no suit " shall be brought or maintained in any court of law or " equity for recovering any sum of money or valuable " thing alleged to be won upon any wager, or shall have " been deposited in the hands of any person to abide the " event on which any wager shall have been made, pro- " vided always as to lawful game, sport, pastime or exer- " cise." A great many cases have been decided under this section. In addition to the *dicta* of Hawkins, J., and Lindley, J., in the case *Thacker* v. *Hardy*, quoted by appellants, I would refer to the case of *Bubb* v. *Yelverton & Ker*,(1) decided in 1871. "A testator had requested a friend to bet for him on certain horses, and the friend had paid the amount lost by the bets. Held, that the request to bet implied authority to pay the bets if lost, and that the friend was entitled to prove against the testator's estate for the amount paid by him in respect of the bets."

Again, "An agreement between a principal and his agent that the agent shall employ moneys of the principal in betting on horse races, and pay over the winnings therefrom to his principal, is not a contract by way of gaming or wagering rendered void by 8 & 9 Vict., ch. 109, s. 18, nor is it illegal."—*Beeston* v. *Beeston*.(2) In another case, " the plaintiff employed the defendant for a commission to make bets for him on horses. The defendant accordingly made such bets, and he received the winnings from the persons with whom he had so betted. In an action by the plaintiff for the amount which the defendant had so received: held, that 8 & 9 Vict., ch. 109, s. 18, which makes null and void all contracts by way of wagering, did not apply to the contract between the plaintiff and defendant, and that, therefore, notwithstanding the statute, the plaintiff was entitled to recover in respect of the bets which had been so paid to the defendant."—*Bridger & Savage*.(3)

In a very recent case, " the plaintiff, a turf commission agent, was employed by defendant to make bets for him

(1) 24 L. T. 822, A. D. 1871.
(2) 1 Exch. Div. 13; 33 L. T. Rep. 700, (A.D. 1875.)
(3) 15 Q. B. D. 363.

in the plaintiff's own name. After the plaintiff had so made some bets, but before he had paid those which were lost, the defendant repudiated the bets. On the settling day, the plaintiff, who was a member of Tattersalls, paid the bets, as, if he had been a defaulter, he would have been subject to certain disqualifications in connection with racing matters, and he sued the defendant for the amount so paid. Held, by Bowen and Fry, L. JJ. (Brett, M.R. diss.) that he was entitled to recover the amount so paid. —*Read* v. *Anderson*.(1)

There is a case of *Berger* v. *Adams* (2) decided by Vice-Chancellor Stuart in 1857, which goes the other way, but it has been distinctly overruled. I think, therefore, that so far as the decisions of the English courts are of any authority with us they are against the judgment.

It has, however, been said, very correctly, that the interpretation given by the courts in France of Art. 1965 C. N. proceeds on a different principle from the English jurisprudence, and that there the agent, who knows at the time of the contract what he is to be engaged in, cannot recover any more than his principal. Art. 1965 is in these words: "La loi n'accorde aucune action pour une dette de jeu ou pour le paiement d'un pari." The decisions in the modern French courts are not authority for us, except as written reason, and it seems to me that the decisions referred to are not authorized by the words of this article, and that both the courts and the writers, who have been quoted by the respondent, have confounded the contract for which no action is given, and the illicit contract. As gambling is not illegal of itself and as its restriction is only due to positive law, it must be evident that the courts are not warranted in going further than the statute.

At the second argument here an effort was made to controvert the doctrine of Pothier, by making a distinction between the *jeu* and the *pari*. It is true Pothier examines a purely theological question as to games of chance inde-

(1) 13 Q. B. Div. 779. (A.D. 1884.)

(2) 26 L. T. R., Ch. 841.

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pendently of the object of the players, *C. du jeu* ch. 3, § 1 No. 53 ; but after considering all this,he rejects the Roman laws which give the player the right to recover back what he has lost at play, because they are not in force under the customs, and he goes on to say: "*Nous n'avons dans ces "provinces, de lois civiles sur le jeu, que les ordonnances de nos "rois, les arrêts et règlements de police faits en exécution. Or "toutes ces lois se bornent à condamner les jeux, à prononcer de "grosses amendes contre ceux qui donnent à jouer, et à dénier "l'action pour ce qui a été gagné au jeu ; mais il n'y a aucune "de ces lois qui donne aux perdans lorsqu'ils sont majeurs, la "répétition des sommes qu'ils ont perdues au jeu.*" He then goes on to show that the ord. of Charles IX. excludes the action to recover by persons of the age of majority, even for "*des sommes considérables,*" *Ib.*, No. 53, and he maintains that the *contrat du jeu n'est pas mauvais en lui-même.*

Whether he is right or wrong in the conclusion he arrives at, is, perhaps, open to question ; but it was this view that dictated Articles 1927 and 1928 of our code, so that it appears indisputable, that the gambling contract is not null, but that the law so far discourages it as to refuse the gambler a right of action. *Actio est jus persequendi in judicio quod sibi debetur*, but no text of law says that there is an action for everything that is due—notoriously there is not, but of course this is exceptional.

Perhaps it may be said that the French writers and courts have decided on rules as to the interpretation of statutes different from those which guided the English courts. There may be some slight differences of a superficial kind as to the interpretation of statutes, but the rules governing this matter are everywhere borrowed from the Roman law, and principally from the title *de legibus.* Now we have three laws of this title bearing specially on the point in question. They are ll. 13, 14 and 15. The first evidently applies to general laws. The reason of the rule there laid down is that a statute of this kind cannot comprise every incidental thing, l. 10, l. 12, and therefore it must be subject to interpretation, or special constitution of the prince. l. 11. The second, l. 14,

refers to laws which are not in accordance with the reason of law, these are interpreted strictly and are not carried out *ad consequentias*. While the third, l. 16, tells us exceptional laws introduced for some particular object are against the tenor of the reason of law. "*Juri communi, (quod nihil aliud est quam regula, rigorque juris civilis) adversum nihil est magis, quam jus singulare et proprium.*" Cujas vi. c. 182, A.

I have heard it whispered, "*qui veut la fin veut les moyens*" as being applicable to this case. In spite of the decision of this court confirmed by the Privy Council, in *Carter* v. *Molson*, this appears to me to be an excellent rule; but its applicability to this case I cannot discover. If there were a rule of this kind: *Qui veut une fin veut deux*, it might, perhaps, aid the respondent's pretentions. I am inclined to think that the writers who have adopted this enlarged view of interpretation have not sought their inspiration in the civil law, but in another order of ideas, which recommends arbitrary modes of arriving at results which seem desirable or convenient for the moment.

A recent writer (Hardcastle p. 4), has given a *dictum* of Lord Blackburn in a well known case, to the effect that statutes had mainly to be interpreted as other documents. But this is followed by a semi-contradiction, based on the case of *Her Majesty's Procureur & Bruneau*. I think, however, that case does not bear out what Mr. Hardcastle says. What the Privy Council held, was that as a court of appeal they must decide as the local court ought to have decided, and that in doing so they would look at modern French authorities as to the proper mode of interpreting a code like the Code Napoléon. That is, they would look at French writers and decisions for the reason of any difference there might be in the mode of interpreting legislation of that peculiar form. They did not say that a special law incorporated in a code should be interpreted as a general law. A code compiled on the plan of the Code Napoléon is principally a summary of the civil law, and so much of it as is so must be interpreted as an authoritative general exposition of the common law; but

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when a statute is incorporated in a code, the statute does not cease to be interpreted as a statute. The Gregorian, Hermogenian, Theodosian and Justinian codes were entirely composed of statutes. The difference sometimes insisted upon as existing between the interpretation of statutes in Scotland and in England seems to be one of degree rather than of principle, and therefore it almost escapes the test of close analysis. I cannot, however, believe that the law *benigne concessa uni* is extended to other cases in Scotland. If so, it is not in accordance with the doctrine of Pothier on this very subject, mentioned above. Tr. du contrat du Jeu, No. 53. As has been already said, there is no fundamental difference between the mode of interpreting statutes under the civil law as received in France, and under the common law of England. Domat has treated the question at some length, and he does not pretend that the Roman law is not his guide. I think I have shown conclusively that under the Roman law a special restriction of the common law cannot be extended. It is not less evident that a statute can only be extended when it runs with the common law, and when the extension is to matter precisely similar in kind—*du même genre* as Domat says, which is not the case here.

The case of *Ladouceur & Morasse* has been referred to. It has no bearing on this one. The Chief Justice and I, dissenting, were of opinion : (1) that the note was for a bet, and that the plaintiff was not the *bona fide* holder, but that the real plaintiff was a party to the bet ; (2) that the unpaid note was not payment.

For both the reasons I have endeavored to explain I am to reverse with my brother Monk ; but the majority of the court is to confirm.

MONK, J. (*diss.*) :—

This is a case which practically is of considerable importance, and had not my learned colleague, Mr. Justice Ramsay gone so fully into the law and facts of the case in dissenting with myself from the judgment about to be rendered by the court, I should have considered it

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my duty to enter more fully into the points submitted for our consideration, much more so than I deem it necessary now. Such expositions are in many instances mere repetitions, and a valuable loss of time. It must be admitted that the language of brokers and commercial agents and correspondents generally is not always very easily understood or its value appreciated by the average outsider. We hear in an abridged form of selling long and short, of margins, of fluctuations, of high, low, and restless, of dull, lively, and feverish, of options, closing deals, of bulls, bears and gambling transactions, but a little common sense, upon a clear statement of facts, may easily dispose of this jargon, and by circumscribing our view to the plain statements and the proof submitted to the court, we can have but little difficulty in understanding the points in issue.

We have first to enquire whether the appellants, Macdougall & Co., were the agents, brokers, of Demers, for the purchase of stocks, and particularly grain, and that in question, at Chicago. In regard to this, there cannot exist the smallest doubt. And, secondly, we have to consider and determine whether they were, as such brokers, authorized by him to sell some 40,000 bushels of July corn, deliverable in the month of July. The proof on this point is undisputed and indisputable. And it is equally established that in pursuance to this order and authority, they sold the corn in question to Demers' satisfaction. It is contended, I do not know on what ground or pretext, that a man cannot legally sell 40,000 bushels of corn, or any other quantity, deliverable at an ulterior date, unless he is possessed as owner at the time of sale of the corn thus sold. This contention is maintained here; but, as before remarked, I am utterly unable to comprehend such a pretension. I may say, however, that I believe that there did not exist, nor does there now exist, any law anywhere which prohibits such a contract.

So far the transaction is plain enough as between Demers and the appellants. But shortly after the sale, the price of the article rose in the market, and this a long

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time before the stipulated period of delivery, and then the appellants applied to Demers for margins to protect themselves. These he refused to furnish, and as the price of corn continued rising, the appellants applied a second time for margins, and were again refused. Thereupon they advised him that they would, in brokers' language, close the deal; they did so, and there was a loss, for the recovery of which this action was brought. His first answer was that he did not authorize to buy, and was not bound to furnish margins; and, secondly, strange to say, he contends that this was a gambling transaction, and that they cannot claim the amount from him.

Now, on the first point, surely the agents of Demers, if they had a right to sell on his account, were entitled to margins to protect themselves. Is there anything illegal in this after notification to Demers? Such a proposition is not only contrary to the usages of trade, but simply preposterous. If Demers goes into this kind of business, he knew what he was about, and he knew, or should have known, that he was bound to protect his agents from loss. He refused to do so, and I am clearly of opinion that they had the right to protect themselves, and in this I cannot conceive that there is anything contrary to law. It is admitted that the accounts between them are and have always been correct. Upon this point there is not and cannot be any dispute.

But it has been urged by Demers that this was a gambling transaction. He comes into Court and he has the hardihood to urge his own turpitude against a fair, usual and legal transaction, and he seeks to get rid of a liability thus contracted by swindling his agents. It appears to me that this won't do. But let us see for a moment whether this is or is not a gambling transaction. I confess I am utterly at a loss to understand what foundation there is for such a pretention. I feel perfectly satisfied that there exists no law either in England, France or this country which would sanction such a view of this particular transaction. But, assuming this to be a correct view of the law in regard to the matter in dispute, this, at the most, would

affect the contract as between Demers and the party to whom he sold the 40,000 bushels of corn and no others It cannot in any way whatever operate against the agents, Macdougall Bros. This is a point of law on which there can be no doubt, either by the law of England, France or this country, unless it were shown that Macdougall Brothers participated in and were parties to an illicit contract. This is not only not proved, but the very reverse is established. They treated this order openly and regularly as they did every other. They treated Demers, not as parties with him, but simply as his agents, no more and no less. There was no manœuvering or shuffling about the matter. It was dealt with in the usual form, and all this quibbling about gambling transactions and the participation by Messrs. Macdougall in what is called a *contrat de jeu*, I regard as utterly inapplicable to the issues submitted for our consideration. If the doctrine about to be laid down by the Court is to be recognized and acted upon, then not only will the law be set at naught, but the business of commercial agencies must be suppressed, and commerce itself would receive a check that would seriously injure its efficiency and usefulness, if such advantages do really exist.

For these reasons and many others, if I deemed it necessary, after what has been said by my learned colleague, to enter more fully into the case, I am of opinion that the judgment of the Court below should be reversed, and that the appellants should be indemnified for their loss.

CROSS, J.:—

This is an action brought for the recovery of the balance of a broker's account for commissions and moneys laid out on business transacted by Macdougall Bros., brokers, of Montreal, for George Demers, a trader, of St. Henri, Province of Quebec. The amount claimed is $1,239.99. The suit bears date the 12th June, 1882.

Demers for defence depends chiefly on the ground taken by him that the transactions,in respect of which the balance is claimed, were all gambling transactions, and that the

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claim was based on gaming contracts, for the recovery whereof the law refused a remedy. He further pleads a *défense en fait*.

Bought and sold notes, statements, accounts and other documents produced, show that the parties commenced their dealings in October, 1881; they were few in number, and exclusively in stocks, up to the time of an understanding being come to, resulting from the following correspondence:—

On the 28th December, 1881, Demers writes to Macdougall Bros., making this enquiry: "Do you do anything "on Chicago exchange on grain, pork, etc., in options? "If you do anything in those options please give me "your conditions and charges of commissions."

On the 29th December, 1881, Macdougall Bros. answer, "Deal in Chicago; margin 10 per cent.; commission, "wheat ⅛ per cent. on the deal and 10 cents per tierce for "lard."

As part of the evidence there is produced, dated at intervals between the 17th November, 1881, and the 3rd of May, 1882, inclusively, twenty-five sold notes and twenty-five bought notes of stocks and produce negotiated by Macdougall Bros. for Demers, the bought notes corresponding generally with the sold notes as to number of shares and quantities, the only difference being in the price, so that in general each purchase could be set off against a corresponding sale, the one balancing the other, as to number or quantity—differing only as to price. There is, besides, a bought note for one single transaction in October, viz., for the purchase of fifty shares Montreal Telegraph stock. There are also produced seven statements showing seven purchases and seven sales of the same subjects, whether of stock or of produce, showing each sale set off against a corresponding purchase, a balance of profit or loss being struck in each case of such double transaction as so effected, all occurring between the 9th of February and the 3rd of May, 1882. Also, accounts current showing the transactions in the same light.

The bought and sold notes and other vouchers are all

made as showing transactions directly between Macdougall Bros. and Demers.

There is, besides, put of record the following correspondence: On the 22nd of April, 1882, Demers writes a letter to Macdougall Bros. from which I make the following extract: "I beg to say that I will remit Monday, and that "everything will be settled honorably. *Corn I intend to "hold sold.*" On the 26th April, 1882, Demers remits $1,000, which is acknowledged by Macdougall Bros. on the 27th in a letter in which they besides say: "We shall be happy "to buy more Western Union, but we are not in the habit "of buying stocks for anyone without a margin, and you "must, therefore, please remit. We carried your stocks and "grain when most other houses would have closed out "the account, and even now we have no margin on your "corn, and do not feel like taking any further risk, as you "appear to have no confidence in our financial standing."

On the 2nd May, 1882, Macdougall Bros. telegraph to Demers: "Chicago agent wants remittance. Will you send "it or close deal."

On the same day, 2nd May, Macdougall Bros. telegraph Geddes, their Chicago agent, "Cover corn if you think "advisable."

On the following day, 3rd May, Macdougall Bros. write to Demers as follows: "Not having seen or heard from "you, we covered your corn to-day and advised you by "wire. We will send statement in a day or two," and of the same date, 3rd May, they send Demers a bought note in their own names as a purchase on Demers' account of 40,000 bushels July corn. This bought note is one of a series produced by Demers on his examination as a witness for Macdougall Bros. On it there appears written by him, "Not authorized:" This corresponds with the position taken by him in his letter of the 22nd April, and in his evidence (see p. 8, l. 14, appellants' appendix.)

On the 8th of May, Macdougall Bros. enclose their account to Demers, claiming $1,239.99 now sued for.

On the 17th May, Demers writes to them as follows: "In "reply to yours of the 8th and 15th, I regret to say that I

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" cannot give you my money away. I beg to refer you to " my letter of the 22nd of April. Had you held corn sub- " ject to my order, you would have been paid same as New " York stocks; should you wish to go further I am pre- " pared to meet you. I have my information taken and " good."

Three letters of Alexander Geddes, of Chicago, are produced, addressed to Macdougall Bros, dated respectively the 13th and 15th of April and the 12th of May. That of the 13th of April acknowledges a remittance of $2,000 of margins, advises the purchase of 10,000 bushels of July corn, quotes July corn at 76c. and anticipates lower prices. That of 15th of April still predicts a reaction for lower prices. That of May 12th quotes July corn at lower prices. say 73⅛c.

I make some quotations from the oral testimony: Mr. Meredith, the chief clerk of Macdougall Bros., when asked what the balance sued for consists of, answers: " It is the " losses on the Chicago transactions, less the profits made " on other transactions. Appellants' Factum, p. 21, l. 14. " Q. Did the plaintiffs actually pay these losses to the " agent in Chicago? A. Yes. L. 17. Q. Were you au- " thorized to buy these 40,000 bushels of corn by the de- " fendant Demers? A. We notified him to cover, that is " to buy, or we would close out. He did not put up the " margin, and we therefore closed out the account. P. " 22, l. 27. There was a. debit against him (the defend- " ant) of about $1,000. P. 22, l. 10. Q. What was the " result of these transactions? A. A loss of $1,737.50. " P. 20, l. 6. Q. All these transactions were to be settled " by the differences between the price of buying and the " price of selling. A. No; he could have delivered if he " wished." P. 23, l. 29.

Mr. Esdaile, broker, at p. 24, l. 33: " The Chicago corres- " pondent of a Montreal broker always looks to the Mon- " r al broker to see that margins are kept up, and I know " in my case they would hold me personally responsible if " margins are not kept up," p. 25, l. 3. " If the firm of " brokers or correspondents at Chicago wires that margins

" are expiring and we do not forward more margins, they " consider they are at liberty to close out the option, " whether long or short, as the case may be, and hold the " Montreal broker personally responsible for the loss, if " any."

Demers states in his evidence, p. 14, l. 9, " I received " the letter of the 27th April, but had not the statement " then and did not make any further remittances. I had " received a statement from them before, stating that I " had no margin with them when I had, I think, over " $2,000. They had made a mistake in the statement, and " I sent the statement to them to be corrected and they " corrected it for me."

It is worthy of observation that the negotiations for the business in question took place between Macdougall Bros. and Demers, without the latter having had any communication with the Chicago agent, or ever having given any authority to employ an agent in Chicago, save that the circumstances and the nature of the business might imply that such an agent would be necessary; yet if an agent only and not a correspondent or firm of brokers, as mentioned by Mr. Esdaile, were employed, his acts at Chicago would still be the acts of Macdougall Bros., by their agent there, so that the dealings and contracts in this case must be looked upon as transacted between Macdougall Bros. and Demers.

No delivery seems ever to have taken place in execution of any of the sales or purchases, with the exception perhaps of the first transaction—the purchase of telegraph stock in October—about which I have not been able to make out to a certainty. Nor does it seem that any delivery was ever asked for, nor I should say intended. The sales generally preceded the purchases, which in each case seem to have been set off against them, and when Meredith is asked about the purpose to settle by differences, he gives an equivocal answer, to the effect that Demers could have delivered if he wished ; evidently implying, in the terms of the understanding, that the contract allowed him the option of cancelling by differences. No time or place for delivery

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was mentioned in the bought or sold notes, but July corn must have meant corn deliverable in July. They were dated at Montreal and in ordinary course would call for delivery there.

The particular transaction which comes in at the close of the account to turn the balance against Demers, was as follows:—Demers was at the time seller, through Macdougall Bros., of four parcels of July corn of 10,000 bushels each, in all 40,000 bushels, on which they considered they had not sufficient margin. They consequently on the 2nd May telegraphed to Demers to furnish more margin, and on the same day telegraphed to Geddes, their Chicago agent, to buy corn for a cover or set off, to protect them against the sales. They demanded no specific amount and allowed Demers no delay to furnish additional margin. They must even then have had some margin if reckoned on the price at which the corn had been sold, because the May purchases, effected to balance Demers' sales, show a loss of $1,737.50, whilst the balance claimed on the whole account is only $1,239.99, and as they seem to have consented to hold over after the sales, it is to be presumed, that for the time, and until corn began to rise in price, they were satisfied with their margin. Unless satisfied at that time they would not have consented to hold over as they did. That margin depended on the general state of accounts at that time between them and Demers, of which no statement has been furnished. They could not arbitrarily defeat Demers' right without showing that they were entitled to some specific amount of margin and allowing him a reasonable opportunity to furnish it. They telegraphed Demers on the 2nd of May, making an indefinite demand for margin, and on the same day telegraphed their Chicago agent to cover. These two acts appear to have been simultaneons, and on the 3rd of May they furnished Demers with a bought note in their own names, dated at Montreal, for 40,000 bushels of corn to replace the corn only deliverable in July.

On these issues and facts, and the evidence so adduced, the Superior Court was of opinion that the balance so sued

for was claimed under gaming contracts, and dismissed the action.

The appeal now under consideration has been taken from this judgment. It brings up for consideration two main questions.

First, whether the balance sued for, if due, accrued in virtue of one or more gaming contracts for which the law denies a remedy; and

Secondly, whether Macdougall Bros. were justified in their purchase of the 40,000 bushels of corn for account and at the risk of Demers, and thus, at his risk and charges, to adjust a deficiency occurring from fluctuation of the market.

On the first question, I would remark, that time bargains such as those in question in this case, are not necessarily illegal, nor does the law refuse to enforce them if they are made for serious transactions intended to be fulfilled, although it might fall out, contrary to the expectation of the parties, that they were not really carried out as contemplated, but came from unforeseen causes to be settled by differences. But if in contemplation of the parties they were at their inception intended to be speculative transactions to be settled by adjustment of prices according to the rise or fall of the market, in such case, I think, the law would hold them to be gambling transactions. It is, of course, argued that nothing appears on the face of the documents themselves which the law disapproves of, and it should not be presumed that they are different from what they purport to be, unless it were so proved as a fact, and this is correct, but it may be so proved, and the appreciation of the proof to show that they are made for a purpose different from what they purport to be, is the sovereign attribute of the tribunal that weighs the evidence. Now, the Judge of the Superior Court has found that the contracts in question were really gambling transactions, and I don't feel warranted in overruling his opinion. It has been universally recognized that transactions effected by time bargains not intended to be executed by delivery of the subjects bought or sold, must

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be considered gambling transactions. I agree with the judge of the court below in the inference he has drawn from the evidence in this case, that the surrounding circumstances lead to the conclusion that the contracts upon which appellants' claim is based were in their nature gambling contracts. The understanding shadowed forth in the correspondence was for options which in the course of dealing were never exercised nor apparently intended to be exercised, save by setting off sales against purchases and *vice versa*. The whole course of dealing from the commencement to the conclusion of the account was but a repetition of this process. The indefinite terms of the contracts as to the time and places of delivery and payment showed a disregard of essential details of real transactions. No deliveries being ever tendered or called for, margins being the only executions of the contracts ever sought for other than adjustments setting off purchases against sales, thus settling differences; in brokers' language, closing the deal, and Macdougall Bros.' own agent at Chicago never calling for the carrying out of the transactions, but merely asking for margin, are so many circumstances indicating the true nature of the dealings between the parties, added to which there is the extreme improbability of a small country dealer such as Demers, having or being able to control either at Chicago or Montreal, such an amount as 40,000 bushels of corn at any one time, besides other considerable values; also, the present suit itself being brought to recover differences occurring on the close of the July corn deal, even before the month of July had arrived.

But it may be asked, how could the contract as between Macdougall Bros. and Demers be a gaming contract as regards Macdougall Bros., who were only to earn their commission on the transactions? A wager implied a liability to lose and a chance of gain, but the brokers in this respect stood neutral. The answer here is that the brokers disclosed no principal; they admitted that they bound themselves, and even no Chicago agent was mentioned until the 2nd May, a considerable time after the sales, and then only an agent. No purchaser was ever disclosed, and as

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far as Demers was concerned none may have ever existed. Seemingly, therefore, to all intents and purposes, Demers was principal on one side and Macdougall Bros. were principals on the other side, and took the risk of the gambling and settling by differences. If corn had fallen, so as to present the opportunity of making a large profit, a broker's operation through Macdougall Bros. would have been all that was necessary to have procured a set off, and they would have been called upon to produce the profit. Had it been a purchase they made for Demers, in place of a sale, and corn had risen in price, they would have been the only party whom Demers would have called upon to make good the profit. No principal would have been apparent. It is, therefore, between these two parties as principals that the nature of the contract must be judged of as well as its consequences. For all that appears to the contrary the sale of corn may have been to Macdougall Bros. themselves, and practically it was so, as they were the parties who took the risk as regards Demers; their asking for margin for their Chicago agent was nothing different to asking the guarantee to be put into the hands of a clerk in their office. It is quite possible and even probable that Macdougall Bros., through their agent at Chicago or otherwise, may have made sales and purchases for Demers as they claim to have done, and that there were such transactions with real purchasers and real sellers; that there was more than a mere communication of writings by them to Demers, but, if so, they have failed to make proof of such transactions and have themselves to blame for not doing so. It is not shown that they made any contracts for Demers with jobbers outside, or any collateral contract whatever for him; but, if even the Chicago agent made such a contract, which does not appear, it must have been one of the same gambling nature, because he too only called for margin and not for delivery.

Returning now to the special transaction respecting which the deficiency is claimed, the sale by Demers of the 40,000 bushels of corn to be delivered in July. The literal meaning of the contract was that Demers should

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deliver 40,000 bushels of corn in July, and as no principal was disclosed and Macdougall Bros. held themselves personally responsible, Demers would look to them for payment as well as the reception of the corn. The real meaning of the parties seems to have been, that a speculative sale of so much corn should be made by Demers in hopes of a rise in the market, and according to him, it should remain sold until an opportunity occurred of covering it by a purchase at a lower figure, and according to Macdougall Bros., until their holding it sold entailed on them too great a risk of liability in a rising market, deeming that they had not sufficient margin in hand to secure them from the chances of loss. Neither party contemplated a real transaction, which was probably the reason of the expression by Demers in his letter of the 17th May, "Should "you wish to go further I am prepared to meet you."

As regards the law applicable to the case. By article 1927 Civil Code, there is no right of action for the recovery of money or any other thing claimed under a gaming contract or a bet, but if the money or thing have been paid by the losing party, he cannot recover it back, unless fraud be proved.

The like provisions are made by articles 1965 and 1967 of the Code Napoléon; the decisions and writers in France under these articles are of assistance in the construction of our own.

It has been argued that although the party to the gaming contract cannot himself recover under such contract, yet he may authorize an agent to make a gaming contract for him, and that agent may recover from his principal what he pays for his principal under such gaming contract, and numerous English cases have been cited arising under a a law similar to our own, which go far to sustain this proposition. It is contended that as the balance claimed in this suit is for monies paid by Macdougall Brothers for Demers, in executing his instructions, they have a right to recover the amount, there being no illegality or prohibition in law of the gaming contract, but only a denial of the right of action on the gaming contract. Among other

authorities, the decision in the case of *McShane* v. *Jordan* (1) is cited in support of this view, but the French authorities, both under the old and the modern law, having provisions similar to our own, take a different view of the matter, and the case of *McShane* v. *Jordan* was not a parallel of the present. The question there was whether the stakeholder could refuse to pay over the stakes to the winner, or rather, having paid over the money in his hands, the amount of the bet, to the winner, the depositor, the loser of the bet, could recover from the stakeholder the amount of his deposit, notwithstanding a payment of it having been made to the winner.

Troplong, Mandat, No. 30. "Il ne saurait y avoir de "mandat pour accomplir des actes défendus par les lois "ou par l'honnêteté.

"Il en serait de même du mandat pour faire la contre-"bande;

"31. Dans tous ces cas le mandat ne produit aucune "action ni du côté du mandant, ni du côté du mandataire; "le mandataire n'est pas reçu en justice à se faire indem-"niser par le mandataire. *Non habebit mandati actionem.*

Paul Pont, Traité des petits contrats, T. 1, p. 323, No. 650, *in fine*, after referring to an *arrêt* which had decided in a contrary sense, continues:—

"Cependant même dans cette hypothèse où il ne s'agit "pas du pari qualifié délit par la loi pénale, cette solution "ne nous paraitrait pas la meilleure. En définitive si le "jeu ou le pari ordinaire n'est pas illicite dans le sens ab-"solu du mot, il n'en est pas moins désavoué par la loi "puisqu'elle refuse de le sanctionner activement en pri-"vant les contractants de toute action. On peut donc con-"sidérer que celui qui a accepté le mandat de jouer ou de "parier, c'est-à-dire d'entrevenir en connaissance de cause "dans une transaction ainsi désavouée par la loi, s'est "associé à ses risques et périls aux chances du jeu ou du "pari, et que s'il a payé le gagnant fut ce même en exécu-"tion d'un second mandat, qui la perte une fois consommée

(1) 13 L. C. Jur. 61.

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" lui aurait donné la mission spéciale de payer, il ne doit " pas être admis à exercer une action en remboursement " contre le mandant, parce que le second mandat n'étant " que la conséquence même le complément du premier, " est entaché du même vice, aussi comprenons-nous à mer- " veille que l'arrêt de la Cour d'Aix a été cassé. La déci- " sion généralement approuvé par la doctrine est suivie en " jurisprudence, il faut s'y rattacher d'autant plus que dé- " cider le contraire ce serait tromper le vœu de la loi, et " dans le cas où elle ne donne aucune action fournir un " moyen toujours facile de l'éluder en donnant à penser " qu'entre des joueurs auxquels toute action réciproque est " interdite un tiers pourrait se placer qui participant au " jeu comme intermédiaire viendrait plus tard sous le pré- " texte de payements effectués à la décharge et l'acquit du " perdant actionner ce dernier en justice."

Mollot, p. 389, No. 485 : " La nullité du marché à terme " fictif étant radicale, de même que toutes les nullités qui " ont leur source dans un motif d'ordre public, il en ré- " sulte qu'aucune des parties n'est reçue à puiser dans ce " marché le principe d'une action utile contre l'autre par- " tie, ni l'agent de change contre son client acheteur ou " vendeur, ni ce dernier contre l'agent de change, ni enfin " l'agent de change contre son confrère acheteur ou ven- " deur et vice versa."

It has been held generally in the English cases under sec. 18 of the statute 8 & 9 Vic., ch. 109, that an agent employed to make a gaming contract may do so pursuant to his instructions, and in the event of loss may pay the loss and recover the amount together with his commission from his principal, also that instructions to bet imply an authority to pay the bet if lost, although made in the agent's own name, and that such authority, the bet being in the agent's name, will become irrevocable, if, by refusal to pay, the agent is subjected to damage or serious inconvenience and loss in his own business.

The English statute is more stringent than our code. It reads as follows : " All contracts or agreements, whe- " ther by parol or in writing, by way of gambling or

"wagering, shall be null and void, and no suit shall be "brought or maintained in any court of law or equity for "recovering any sum of money or valuable thing alleged "to be won upon any wager."

In *Beyer* v. *Adams*, Vice-Chancellor Stuart held the winner of a bet not entitled to recover from the holder of the stakes. This case, however, is no longer authority, having been since overruled.

In *Cooper* v. *Neil* (*see Weekly Reporter* for 1878–79, vol. 27, p. 159,) the Master of the Rolls, Brett, remarked that "the true construction of the statute was that it affected "only the contract that made the bet. That in that case "three contracts had been suggested; one was that the "defendant came to an express agreement that the broker "should enter into transactions of the Stock Exchange, "which might end either in gain or loss, but that what-"ever happened to the broker he would only claim differ-"ences from, or pay differences to the defendant. In that "case he was inclined to think the broker could not sue "for the differences, because it would be a gambling trans-"action. The second was, if the broker only made time "bargains on which he could not be legally held liable, "and had not paid, he could not recover against his prin-"cipal. The third supposed case that the defendant had "employed the plaintiff to make time bargains with the "jobbers, on which he, the plaintiff, would be personally "liable; he would, in that case, be liable to his broker to "make good such time bargains."

In *Thacker* v. *Hardy*, L. R., 4 Q. B. D., p. 685, by Mr. Justice Lindley, the broker was held entitled to recover from his principal, although he knew as between them that the transactions were to be of a gambling character, knowing at the same time that the broker would require to bind himself personally for contracts which he made with third parties by the instructions of his principal. The broker was entitled to be indemnified by his principal for the consequences of contracts, on which he was personally bound to third parties, although, as between himself and his principal, it was perfectly understood they were in the nature of gambling transactions.

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In *Read* v. *Anderson*, L. R., 10 Q. B. D., p. 100, a case tried before Mr. Justice Hawkins, without a jury, the plaintiff was a commission agent for taking racing bets, and a member of Tattersall's subscription room. He was instructed by the defendant to take bets on horse racing; the bets were lost, and he paid the winners. He brought an action against the defendant to recover the balance due him for such payment. The defence was that the debt, being one which accrued under a gaming contract, could not be recovered. It was held that the bets were not illegal; consequently, they might be paid voluntarily at the option of the loser, although the law denied the winner authority to enforce them; that an authority to bet implied an authority to pay if the bet was lost. This implied authority might be found from usage or from the nature of the dealings between the parties. He found, as a fact, that when the defendant gave an authority to bet he gave an implied authority to pay in case of loss. Also, that the defendant did not revoke the authority to pay; he only desired to raise the question whether the bets were honestly made, and held that if a person employs another to bet for him in the agent's own name, an authority to pay the bets if lost is coupled with the employment, and although before the bet is made, the employment and authority are both revocable, the moment the authority is fulfilled by the making of the bet, the authority to pay it if lost becomes irrevocable. This applies only to cases where the agent by the principal's authority makes the bets in his own name, so as to be personally responsible for them.

In appeal, L. R., vol. 13 Q. B. D., p. 779, it was held that the employment of an agent to make a bet in his own name on behalf of his principal may imply an authority to pay the bet if lost, and on the making of the bet that authority may become irrevocable.

The plaintiff, a commission agent, made a bet for the defendant, which was lost. He paid the bet; his failure to do so would have made him a defaulter, and worse off than if he were exposed to an action. It would have been ruin to him. He would have been liable to the winner

by the rules of the turf, and subject to expulsion from Tattersall's. Bowen and Fry, L JJ., concurred in affirming Mr. Justice Hawkins' judgment; Mr. Justice Brett dissented. The two former Justices held that there was an implied authority for the agent to indemnify himself from the consequences that would have resulted to him had he refused to pay the bet; that he had placed himself in a position of pecuniary difficulty at defendant's request, who had impliedly contracted to indemnify him from the consequences which would ensue in the ordinary course of his business from the step which he had taken; he would have been liable to be turned out of the membership of the Tattersall's room, where he did his business on which his living depended. Brett, the Master of the Rolls, dissented, holding that if a principal employs an agent to perform an act, and if, upon revocation of the authority, the agent will be by law exposed to loss or suffering, the authority cannot be revoked. But in the case under consideration, no claim could have been lawfully enforced against the agent. True, the betting contract was made by the plaintiff in his own name on behalf of his principal, nevertheless, it could not be enforced against him. If the other party to the bet had lost and had declined to pay, he could not have been compelled to do so. But it had been contended that although this view be true, the law puts it into the power of the plaintiff to enforce payment by the defendant of the amount of the bet, because, if not paid, the plaintiff will suffer a loss in his business, but the plaintiff's business, although it may not be illegal, is directly objected to by the law, and the contracts made by him in his business cannot be enforced. It is a business of which the law ought not to take notice and, therefore, the inconvenience and loss which the plaintiff might suffer in his objectionable business, form no ground to hold irrevocable an authority which the plaintiff ought not to have given. The cases in which an authority cannot be revoked ought to be confined to those in which the agent will, upon revocation, suffer what the law deems to be an injury. For these reasons he was of opinion that Mr. Justice Hawkins' judgment was wrong.

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However great the respect which should be conceded to the majority in this case, I think it will be admitted that the reasoning of the dissenting judge is very strong; it is, moreover, in accord with the French authorities, and especially with the view by them taken that what a principal cannot lawfully do himself, he cannot legally authorize an agent to do for him. The language held by Mr. Justice Story, in his work on Agency, § 339, might, I think, have some application here: "There "can be no reimbursement or contribution among "wrong doers, whether principals or agents." In the case of *Reed* v. *Anderson* the points involved do not ever seem to have been subjected to the test of the highest tribunal, and far as it goes it does not seem to me to go the length of ruling the present case. Demers gave no authority to employ an agent in Chicago, he had no contract with that agent, the contracts he made were with Macdougall Brothers, and in their name down to the last disputed one of the purchase of the 40,000 bushels of July corn, whereof the bought note is produced, their authority ever to have made this contract was denied from the first, they were in fact forbidden to make it. Demers' position is consequently stronger than if the authority had existed and had been revoked before the broker had paid a liability which he had incurred for his principal, and no case has been cited going so far as to hold that a broker whose authority had been revoked after he had made a gaming contract for his principal and before he had fulfilled it, could persist in fulfilling it against the will of his principal, and maintain an action for indemnity against his principal, unless his refusal to pay would subject him to pecuniary loss or serious inconvenience beyond the mere inconvenience of being sued by his agent on a contract that could not be enforced. I take it that, according to our system, if there was a liability incurred by Macdougall Bros. for Demers, Demers would be liable to answer to their suit as being their *garant*, and if there was no liability, there would be no need of such recourse.

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On the second question, viz.: Whether Macdougall Bros. were justified in their purchase of the 40,000 bushels of July corn. As a general rule, a transaction made for another without authority would be a nullity. It is, however, permitted to one person to act as the *negotiorum gestor* of another to do for him a useful business to his profit or advantage. It is argued that the purchase in question was in the interest of Demers, and that it was justifiable by the usage of brokers and by the circumstances of the case. It is not shown that it was in Demers' interest. He contemplated the value of corn in the month of July, at which time he conceived he could fulfil his sales at a low price and have a profit on them. The corn to close the deal was bought 3rd May at a high price, after which time it is proved that it fell off in price, but it does not appear what it could have been got for in July. It was purchased on the theory that Demers had not the corn and was unable or unwilling to fulfil his contracts. The suit was brought on the 12th June, 1882, on a claim founded on the close of the deal in May, before the intended speculation had ripened into performance. It is, therefore, not shown that the deal was closed in Demers' interest.

As to its being according to the custom of the brokers, as spoken of by Mr. Esdaile, "to close out the option, "whether long or short as the case may be." This may very well be a custom sought to be established by the brokers much in their own interest: it does not follow that it is warranted by law; on the contrary, it at once defeats the fulfilment of the contract in the sense in which it purports to have been made, and introduces the gambling element by a balancing by difference in price. The pretence for doing this is a supposed default to fulfil a contract and a legitimate power conferred by that default. A resale of a subject purchased for default of payment is more readily understood than a purchase to protect from the consequences of a sale, because the seller is supposed to possess or to be able to procure within the required time the property he has sold. The pretence, no doubt is

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that it was part of the contract that a margin of 10 per cent. should be advanced at the initiation of the transaction; and that it should be kept up to that figure, if required by the fluctuations of the market. I don't think this is proved; but suppose it were, what are the legal consequences of failing to do so in the case of sales? In the first place, the broker should certainly state specifically the amount required, and I should say give notice of when it is required, but in case this does not bring the money, what are the legal consequences? Not an unauthorized purchase of a like amount. The sale must have been made either with the intention of a delivery or it was a sale to be closed by a deal. The first proposition would imply an obligation to deliver, but only when the contract matured—the last a speculative transaction, to be settled by difference. The first, only, is the one the legal consequences of which require to be considered. In an ordinary sale for future delivery, the seller only makes himself liable for damages for non-delivery at the time promised. If he gets the broker to contract for him in his (the broker's) own name, and adds the subsidiary contract of undertaking to indemnify him from chances of liability in case of a change in the value of the article dealt in, the consequences of failing to keep up a margin may authorize the broker to expend money to protect the interests of his principal by himself paying for and furnishing to the purchaser the article sold, when the time arrives for the maturity of the bargain, but it cannot authorize a purchase by anticipation to interrupt the operation of the contract and defeat the vendor's expectation of a profit at the time he has calculated on. If the contract had matured, the broker would have a perfect right to protect himself by purchasing for his own protection. If it had not matured, he might still do so at his own risk, and if the seller failed to produce the article sold when the time for delivery arrived, apply his purchase in liquidation of the sale for which he was bound; or if he liquidated and closed the deal by anticipation, he would be protected in doing so if he could show that the operation had proved to be in the interest

or for the benefit of the seller. It is quite true that if his bargain had been for a margin, to be kept up, he could at once, on the failure of such margin, take whatever steps the law might allow him to claim that margin, or perhaps demand security, but he could not, on legal principles, do an authorized act at the risk of his principal, such as buying by anticipation to cover a possible future loss.

This view is corroborated by the authority of a book cited at the argument by the counsel for the appellants, viz., Mollot, Bourses de Commerce. As to allowing resales or purchases as a set off, it would seem from the numbers cited, 182 and 183, to favor the appellants' pretensions, but by reference to the conclusion of No. 181, it would appear that the remarks in Nos. 182 and 183 apply exclusively to "Marchés au comptant." Again No. 184 is as follows:—

"Dans les marchés à terme si la remise donnée est insuf-
" fisante, soit que la somme se trouve trop faible par suite
" d'une provision erronée, soit que les valeurs remises
" comme argent aient subi une baisse depuis, il n'est pas
" douteux que l'agent de change qui à l'échéance du terme
" a levé et payé tout le prix des effets achetés, ait une ac-
" tion en remboursement de l'excédant contre son client.
" Sur ce point les motifs du recours sont les mêmes que
" pour les marchés au comptant surtout lorsqu'un supplé-
" ment de garantie avait été promis par celui-ci."

185. "Mais une difficulté sérieuse consiste à savoir si
" ne voulant ou ne pouvant pas avancer ce qui lui man-
" que pour lever les effets achetés, l'agent de change ache-
" teur a le droit de les faire revendre aux risques, périls
" et frais de son client. Suivant nous il est nécessaire
" d'établir cette distinction; ou le terme du marché est
" échu, ou il a encore quelque temps à couvrir.

"Dans le premier cas nous pensons que l'agent de
" change est bien fondée à faire opérer la revente comme
" si l'achat eut lieu au comptant.

No. 183. "Nous avons déjà dit en effet que lorsque le
" marché à terme arrive à son exécution, on doit y procé-

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" der de la même manière que pour le marché au comp-
" tant. Voir No. 152. Les raisons de décider quant au
" droit de revente sont encore identiques. Le client qui
" a fourni une couverture même insuffisante a dû prévoir
" qu'au moment de l'exécution du marché à terme il fau-
" dra qu'il remit le prix entier de l'achat. Mais avant
" l'échéance la situation est différente, car la hausse peut
" succéder à la baisse et reporter les effets achetés au
" prix du marché dans l'intervalle du temps qui doit s'é-
" couler depuis jusqu'au jour du terme. Aussi cette ma-
" nière de procéder qu'on appelle en langage de Bourse
" *exécuter le client*, a été critiqué avec raison dans le cas
" dont nous venons de parler, alors même que l'agent de
" change avait fait opérer la revente par la Chambre
" Syndicale. Les actes de la Chambre Syndicale, quelle
" que soit la garantie morale qu'elle présente n'obligent
" point les tiers, et le règlement intérieur de la compagnie
" dont l'agent de change excipait dans cette espèce, ne
" leur est pas plus opposable, parce qu'il n'a point été
" sanctionné par l'autorité ; il ne permet même la revente
" *de plano* qu'en cas d'inexécution au jour de l'échéance.
" C'est ce qui a été jugé notamment dans les affaires
" Fournier et Lechat. Puisque l'agent de change s'est
" contenté d'une somme déterminée qui devait dans sa
" pensée remplir approximativement la différence possible
" entre le prix d'achat et le prix de revente, il doit s'a-
" dresser à la justice pour obtenir l'autorisation de reven-
" dre avant le terme convenue."

He, however, cites an *arrêt* dans la Première Chambre de la Cour Impériale de Paris that had decided that a " simple sommation faite au client " was sufficient for a *mise en demeure*, of which he, of course, disapproves.

If this view of Mollot should prevail as regards a re-sale, how much more should it operate against a re-purchase in case of an unexpired term for the delivery of effects sold? I think his reasoning is most satisfactory, in fact conclusive on this point.

This author, at No. 454, goes on to give the jurisprudence on the subject of the *marchés à terme*, which are con-

sidered gaming transactions, citing the celebrated *arrêt* of Forbin Janson, analogous to the one now under consideration, he concludes by No. 456:

"En résumant les décisions judiciaires dont nous venons de rendre compte jugent: 1o. Que les marchés à terme sur les effets publics qui n'ont d'autres objets que les différences de cours doivent être reputés jeux de Bourse et annulés comme étant dépourvus de cause et de réalité comme contraires aux loix, à l'ordre et la morale publique. 2o. Que l'absence du dépôt rend présumable le défaut de cause et de réalité. 3o. Que les jeux de Bourse ne peuvent engendrer aucune espèce d'action utile devant les tribunaux au profit de qui que ce soit, ni du client contre l'agent de change ni de celui-ci contre son client, ni de celui-ci contre son confrère ou les ayants droit de ce dernier."

I am, therefore, of opinion that the balance sought to be recovered in this case is claimed in virtue of contracts proved to have been made between Macdougall Bros. and Demers, and to have been gaming contracts intended not to be executed according to their literal tenor, but by liquidation, setting one set against another set, and settling by differences of price, and that any contracts or disbursements of money that may have been made by Macdougall Bros., in furtherance of said gaming contracts, of which I think there is not a sufficient proof, must themselves have been made under contracts of the same nature, viz., gaming contracts. That Macdougall Bros. have not shown that they were authorized or had a right to purchase for account of or at the risk and charges of said Demers on the 3rd of May, 1882, 40,000 bushels of July corn, as charged in their accounts filed in this cause, and have failed to show that if said corn had been kept sold until the month of July, 1882, they would have suffered any loss thereby, or have been entitled to claim any balance of account from said Demers, consequently that the judgment of the Superior Court, dismissing the action of the said Macdougall Bros. should be confirmed.

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DORION, C. J., (after stating facts):—

Demers is a trader in a back parish, and he enters into transactions amounting to nearly a million of dollars. He contracts to deliver 40,000 bushels of corn, but manifestly there is no intention to deliver. The correspondence between him and the appellants shows that there was no intention to deliver, but that this as well as the other transactions were to be settled by payment of differences. The case is governed by the French law, and according to the well-settled principles of that law such a transaction is a fictitious contract. Numerous decisions in this sense can be found in the *arrêts* of the French courts, and the authors are all agreed. Not an *arrêt* can be cited to the contrary. No action lies under the circumstances, and I agree with Mr. Justice Cross that the judgment should be maintained.

TESSIER, J., concurred.

Judgment confirmed.

Dunlop & Lyman, attorneys for appellants.
Pelletier & Jodoin, attorneys for respondent.
(J. K.)

January 27, 1886.

Coram DORION, C. J., TESSIER, J., CROSS, J., BABY, J.

OLIVIER DAIGNEAU
(*Defendant in Court below*),
APPELLANT;

AND

ANSELME LEVESQUE
(*Plaintiff in Court below*),
RESPONDENT.

Lessor and Lessee—Repairs to leased premises—Damages—Resiliation of lease—Mise en demeure.

HELD, 1. (Affirming the decision in Review, M. L. R., 1 S. C. 414):—Where the lessor, in making repairs to the leased premises, used material which emitted a disagreeable odour and damaged the stock of the lessee, a grocer, that the latter was entitled to have the lease rescinded, and to recover the amount of damage sustained by him.

2. In such circumstances the more regular course is that the lessee should put the lessor *en demeure* to remove the cause of damage, before bringing an action in resiliation of the lease and to recover damages.

The appeal was by the lessor, from the judgment of the Court of Review, reported in M. L. R., 1 S. C. 414.

Nov. 24, 1885.] *Robidoux*, for the appellant:—

Aux termes de l'art. 1641, le locataire a droit d'action pour contraindre le locateur à faire les réparations stipulées par le bail, ou pour obtenir la permission de les faire aux frais du locateur, et faire résilier le bail, à défaut de l'exécution de telles réparations. Ici l'intimé n'a adopté ni l'un ni l'autre des deux premiers recours. Il n'a pas demandé que l'appelant fût condamné à faire les réparations et il n'a pas demandé que l'intimé fût autorisé à les faire, à défaut par l'appelant de les faire lui-même. Ce n'était que subsidiairement qu'il pouvait demander la résiliation du bail, et ce n'était que subsidiairement qu'elle pouvait être accordée.

Rochon, for the respondent:—

L'appelant prétend que l'intimé devait le mettre en demeure d'avoir à ôter le papier en question après qu'il

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fut posé; mais ce procédé aurait été parfaitement illusoire, puisque dans le temps les dommages étaient faits. Voir une décision rendue par la Cour de Révision, à Montréal, *in re Tylee* v. *Donegani* (1), où il a été jugé: "que le locataire d'une maison inhabitable et malsaine a le droit de "l'abandonner. et par là même, de résilier le bail, sans "action, *ni mettre en demeure son propriétaire*, et cela, quand "bien même la nuisance aurait pu être enlevée à peu de "frais et sous peu de temps." Nous citerons enfin la cause de *Rémillard* v. *Cowan et al.* (2). L'auteur des défendeurs avait loué au demandeur une maison pour y établir un atelier de photographie. Plus tard, les défendeurs érigèrent sur une propriété avoisinante, à eux appartenant, un mur de vingt-deux pieds, qui a l'effet d'enlever au demandeur partie de la lumière dont il avait besoin pour exercer son métier. "Jugé: que l'érection du mur en "question constitue pour le locataire un trouble dans sa "jouissance, et lui donne le droit à la résiliation du bail "et à des dommages contre les représentants de son locateur." La plupart des remarques faites par le savant juge Casault, dans cette cause, peuvent s'appliquer au cas de l'intimé.

DORION, C. J.:—

This case has given us some trouble. Daigneau leased a house to Levesque from July, 1884. Part of it was occupied by another tenant, and as to this part Levesque's lease was only to begin on 1st November. At the same time Daigneau sold Levesque his stock of groceries in the leased premises, and bound himself not to carry on business in that neighbourhood. By the lease, Daigneau also bound himself to clapboard the house which was then in an unfinished condition. On the 21st October the workmen commenced the work. They put tarred felt under the clapboarding, and this emitted a disagreeable odour which penetrated into the premises occupied by Levesque as a shop, and injured his groceries. The work was finished on the 31st October. Levesque, without putting Daigneau *en demeure* to remove the felt.

(1) 3 Rev. Légale, 441. (2) 6 Q. L. R. 305.

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brought an action to resiliate the lease, and also claimed damages for injury to his goods by the smell of the tarred felt. The Court in the district of Ottawa dismissed the action, but this judgment was set aside in Review, and Levesque was allowed $200 damages for the injury caused to his goods by the smell of the tarred felt. The part of the action by which he asked damages because Daigneau had continued to carry on business, was dismissed. Daigneau has appealed from the part of the judgment which condemned him in damages, and urges that the other party gave him no notice of damage and made no complaint; and that the paper is of the description in ordinary use for the purpose.

The evidence is somewhat conflicting, but there can be no doubt that the weight of testimony is to the effect that the goods were injured by the smell. There is no proof of any *mise en demeure* except the action. If the defendant (now appellant) had pleaded. "It is true the tar-" red felt is injurious, I will remove it," he would be in a much better position before this Court. But he pleaded that there was no damage done to the goods, and it is clearly proved that there was damage. The Court of Review cancelled the lease, and granted damages. As to the cancellation of the lease I do not think there is any difficulty; but I would not have this case taken as a precedent for holding that the *mise en demeure* is not required before bringing an action for the recovery of damages. If the appellant had pleaded as he should have done, offering to remove the tarred felt, I, for my part, would not have been disposed to grant any damages. As to the amount of damages there is considerable difficulty. If I had been sitting in the Court below, I would not have given as much as $200, but seeing that the amount is not very large, the Court is of opinion not to disturb the judgment on a mere question of appreciation of damages, and it is therefore confirmed.

Judgment confirmed.

Robidoux & Fortin, attorneys for the appellant.

Rochon & Champagne, attorneys for the respondent.

(J. K.)

May 26, 1886.

Coram DORION, C. J., MONK, CROSS, BABY, JJ.

THE MONTREAL CITY PASSENGER RAILWAY CO.
(*Defendants in Court below*),
APPELLANTS

AND

ROBERT IRWIN
(*Plaintiff in Court below*),
RESPONDENT.

Carrier—Responsibility—Injury to Passenger—Onus Probandi.

HELD :—That a company engaged in the conveyance of passengers is responsible for injuries sustained by a passenger while being carried in the company's vehicle, unless it be proved by the company that it was impossible for them to prevent the accident.

The appeal was from a judgment rendered by the Superior Court, Montreal, DOHERTY, J., condemning the appellants to pay respondent the sum of $225 damages.

Tait, Q. C., for the appellants.

Archibald, for the respondent.

The opinion explains the case.

CROSS J. :—

Irwin brought the present action against the City Passenger Railway Company for damages alleged to have been sustained by him in consequence of one of their vehicles, on which he was a passenger on the 10th of March, 1884, being driven with unusual speed round the corner formed by St. Catherine and Bleury Streets, and down Bleury Street, where the driver lost control of the horses, and by the violence of their career caused the tongue to become detached from the carriage. As a consequence it came violently in collision with a tree in the street, whereby Irwin was forced with violence against the front of the vehicle and was caused serious injury which he estimates at $500, all of which he alleges was caused by the incompetence, fault, and gross negligence of the ser-

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vant of the City Passenger Railway Company in charge of the vehicle.

The Company pleaded that they had been guilty of no negligence whatever in the matter; that the accident was due to the bad condition of the roads at that season of the year, which the City Corporation had neglected to keep in repair;—that Irwin himself was in fault, and guilty of imprudence by standing up although requested to keep his seat by the conductor; that if he had done so he would not have been injured, and that he did not suffer the damage he pretended.

On the proof made, the judge of the Superior Court awarded Irwin $225 damages, and the Company have appealed.

It is shown that Irwin received a considerable shock, that he was bruised, and his nose was badly hurt; it bled freely; it was dressed in a druggist's shop, and afterwards attended to at least on two occasions by Dr. Howard, the effect whereof was to confine Irwin to the house for some time, and a slight permanent mark was left on that feature.

The road was proved to be in rather a bad condition, as is almost inevitable at that season, and the manufacturers of the vehicle prove that it was sufficiently strongly made and of good materials. The driver, Desormeau, attributes the fault to a hole in the road opposite a little street leading to St. Patrick's Church, and says his speed was not unusually fast.

The Superintendent produces the iron bolts that served as fastening to the shafts which were broken; he states that they were perfectly sound and of the best iron.

There is contradictory evidence as to the speed at which the vehicle was going. Atkin, a fellow passenger, swears that in going round the corner, that is of Ste. Catherine and Bleury Streets, "we were going at an unusually ra-
" pid pace; also we proceeded at a very rapid pace down
" Bleury Street. I perceived that the horses were at one
" side of the sleigh, and I saw that the accident was ine-
" vitable, so I got hold of the straps in my hand, and we

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" dashed against a tree, and the whole of the passengers " were piled in a heap at the bottom of the car, and when " we righted ourselves it was observed that Mr. Irwin " had sustained a very severe injury."

Admitting that the carriage was substantially built of sound material, and that the roads were in a bad condition is not enough to exonerate the company from blame, or to avoid the presumption that the driver was in fault. The rule with regard to public vehicles for a passenger that is injured is, he commits his safety to the driver, who is presumed by his negligence or mismanagement to have caused the injury, unless he proves that he could not have prevented it. Among other precautions he should have taken was that of calculating the necessary means of overcoming the extra danger. He should, to excuse himself, have shown that it was impossible for him to do so. There was a very early case determined about the year 1847, holding the owner of a vehicle strictly to this rule, and making him responsible for his hired man. It was the case of *Cole* v. *Brewster*, a collision of vehicles, whereby the plaintiff lost an arm. See Pothier, Louage, No. 193 ; Nouveau Denizart, vo. Délit, p. 151, No. 2. I do not think that the circumstance of the conductor asking the passengers to keep their seats, which is proved, was of much account. It was natural when the sleigh was rushing down the street, a pretty steep declivity, by gravitation and momentum, that the passengers would be excited and would be on the alert to see what was to happen. I am of opinion that the judgment should be confirmed.

Judgment confirmed.

Abbott, Tait, Abbotts & Campbell, attorneys for appellants.
Archibald, McCormick & Duclos, attorneys for respondent.
(J. K.)

May 21, 1886.

Coram DORION, C.J., RAMSAY, TESSIER, CROSS, BABY, JJ.

CADOT,
(*Defendant below*),
APPELLANT;

AND

OUIMET,
(*Plaintiff below*),
RESPONDENT.

Parish—Canonical and Civil—Erection and division of parishes —Tithe.

HELD:—(Affirming the decision of Cimon, J., 7 Legal News, 415), that when a portion of a canonical parish civilly constituted, is detached by decree of the bishop, and annexed to a canonical parish not civilly constituted, the tithe is due by an inhabitant of the dismembered parish to the new *curé*.

Under the old law of France prior to the cession, the bishop had the right to create, unite or divide parishes in the interest of the church, having due regard to vested rights; and this condition of things has not been affected by the laws enacted for the Province of Quebec, since the cession of Canada.

The appeal was from a judgment of the Circuit Court, district of Joliette, (CIMON, J.), reported in 7 Legal News, p. 415.

The action was by the *curé* of a canonical parish not civilly constituted, dismembered from a canonical parish civilly constituted, against an inhabitant of the dismembered parish, for tithe.

The question was whether a person being a Roman Catholic and a proprietor in the parish, could be compelled to pay tithe to the new *curé*.

Geoffrion, Q.C., for the appellant.
Cornellier for the respondent.

The judgment of the Court was delivered as follows:—

RAMSAY, J.:—

The question to be decided in this case is, to whom does

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tithe belong? The respondent, plaintiff in the Court below, is the *curé* of the parish of Ste. Julienne, erected by canonical decree, not confirmed civilly, out of the limits of the parish of St. Esprit, erected by canonical decree. confirmed civilly. The defendant is the owner of land situated within the limits of the new parish, and the tithe sought to be recovered is the tithe of the grain growing on said land. The defence is that the *curé* of the primitive parish is the *décimateur*, the new parish not being erected civilly. In other words, it is contended that the Bishop cannot, by canonical decree dividing a parish, divide the tithe between the *curé* of the old parish and the new.

This question is not embarrassed by any other issue. Appellant has not acquiesced in any way. He has tendered his tithe to the *curé* of St. Esprit, and he has constantly received spiritual consolation and assistance from the *curé* of St. Esprit. In order to restrict our investigation to its narrowest limits, it may at once be remarked that acquiescence in its most ample form could not affect the question, if it be true, as appellant contends, that the tithe attaches by the civil recognition of the parish, unless in the extreme case of the payment for so long a period as to create a presumption in favour of the civil erection of the new parish, which, of course, is impossible in the present case. Again, by an Ord. of 21 Aug., 1727, the inhabitants of a parish were enjoined to pay the *droits de sépultures et autres dus* to the *curé* of the parish. 1 E. and O., 484. And it seems these rights were to be so paid whether the *sépulture* was in the parish or not.

We have then to enquire what tithe is? In its first aspect this is a canonical question; and, therefore, we may fairly look at the works of the canonists to see how it was considered by the church. So far as I understand the matter, tithe is a payment for the support of God's ministers, and therefore, divines say, it is not only a moral obligation but one of natural law. The amount, however, is judicial; that is, it can only be recovered according to custom, or according to express law. The right to it—*jus persequendi*—in a sense more abstract than when we

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say *actio est jus persequendi*—can never be alienated from the church. Its fruits may sometimes be alienated, formerly it might be enfeoffed, its fruits may be farmed; but whatever the form adopted to collect the revenue or to realize its value, it can only be collected by or through the rights of the church.

All this appears to be so reasonable that it would be difficult to suppose that the law had derogated from it in any essential particular. It will scarcely be maintained by the appellant that there is any text of law which maintains his pretensions; but he endeavours to support them by an inferential dealing with certain enactments. This is, doubtless, a perfectly logical mode of proceeding, provided the reasoning be sufficiently cogent. The only objection to the process is its tediousness, nevertheless we must meet the questions as advanced by the litigant.

It is said that the tithe is due to the parish, and that the parish is necessarily a territory marked out by competent authority. Without admitting this proposition to be technically exact in every particular, it is sufficiently so for the purposes of the present case. But when appellant goes on to say that "*lorsque notre droit écrit*," meaning thereby the statutes and the civil code, "*se sert du mot paroisse, il a toujours entendu parler d'une paroisse érigée canoniquement et civilement*," he invokes a test which is worthless, even if true. In the course of these remarks it will be shown that the statement is inexact.

It was an excellent saying of Callistratus "*optima enim est legum interpres consuetudo*," D. 1, 3, 37; and therefore let us see how matters stood in France. We must however bear in mind, in coming to a decision as to what the law was, that the law cannot be deduced from isolated acts of authority alone, unless they be consonant with a general principle. (*Quod non ratione introductum, sed errore primum, etc.*, D. 1, 3, 39.) Of abuses there may be scores in ecclesiastical as in civil administration,—anomalies may exist; but we are not to weave a system out of them at war with principle. We shall find, however, I think, that we are not called upon to make any heroic

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resolves in dealing with the matter before us, for the abuses are not great, and the anomalies have retained their distinctive characteristic.

The object and origin of tithe give rise to no difficulty. The law of France follows precisely the definitions of the canonists. Nor does it seem to have been different in other catholic countries; in England, tithe came in with Christianity, before it was recognized by positive law, as part of the ecclesiastical organization. It was not founded on the Levitical law; but on similar reasons. 2 Blackstone, 25.

The origin of the parish is more obscure. Evidently it is not an essential part of an ecclesiastical system, and it therefore grew insensibly as the Christian population increased, and according to its necessities. It is not therefore a question of great importance, whether the Christian parish formed itself upon a delimitation already recognized by the civil law or not. It is important, however, to know that before the church was recognized by the Emperor, the parish had an existence as part of the external policy of the church. In support of this we find in d'Hericourt this note: "*il n'est pas généralement vrai qu'avant la conversion des empereurs, les prêtres n'étaient chargés en particulier d'aucune partie du diocèse; il est constant que dans le diocèse et dans la ville d'Alexandrie, il y avait des prêtres chargés du gouvernement de certains quartiers, qui étaient comme des paroisses. On en voit dès le temps de saint Denis d'Alexandrie, au milieu du troisième siècle. Il y avait aussi à Rome des titres de prêtres et de diacres. Il y a tout lieu de croire qu'il y en avait pareillement dans les diocèses des grandes villes. Voy. Thomassin, Discipline Ecclésiastique, première partie, liv. premier, chap.* 12; *et Fleury, Institution du Droit Ecclésiastique, première partie, chap.* 18."

Mr. Justice Beaudry suggests that, in France, the parishes formed themselves on the *communautés*. It would require very minute, and very extensive topographical knowledge to maintain or deny this proposition; but if it be correct, it goes to show the convenience of using a delimitation already existing and well known, and

one that was recognized by the state, and no more. It does not imply that the state declared that the *communauté* and the parish should be co-extensive. It is however not improbable that in many cases the parish accommodated itself to the limits of the *communauté*. Evidently the church would turn to account any institution that it found existing; and it certainly found the *communauté* in existence. Freminville, on whose authority Mr. Justice Beaudry relies, dates the foundation of *communautés* in France from the latter part of the fifth century, about the year 486. This was only about ten years before the conversion of Clovis. More recent writers, who have dealt on the history of institutions, place the origin of the *communauté* long prior to the history of nations, as we know them. Sir Henry Maine finds resemblances, much too strong and numerous to be accidental, between the Teutonic township or mark, and the Indian village community; and he quotes Mr. Freeman, without disapprobation, when he "speaks of the politics of the Mark, as having become the politics of the parish vestry." (See Maine, Village communities, sect. 1, pp. 10 and 12.) Stubbs, in his constitutional history of England, doubts the "Mark" being the basis of our policy, (note vol. 1, p. 83,) but he goes on to say, (*Ib.* 85.):

"40. In a further stage the township appears in its ecclesiastical form as the parish or portion of a parish, the district assigned to a church or priest, to whom its ecclesiastical dues and generally, also its tithes are paid. The boundaries of the parish and the township or townships, with which it coincides, are generally the same; in small parishes, the idea and even name of township is frequently, at the present day, sunk in that of the parish; and all the business that is not manorial is dispatched in vestry meetings, which are however primarily meetings of the township for church purposes."

If this be the true history of the origin of the parish, and it bears the appearance of violent probability, the parish was not originally the creation of civil authority. We have then a right to ask, at what period did it become so? No so-

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lution is offered of this obvious difficulty. Let us see then how the matter was considered by the legislative authority in France. In April 1695, an edict of a very declaratory kind was passed *concernant la jurisdiction ecclésiastique.* In the preamble, the king recognizes his obligation to use his authority for the good of the church, and to maintain discipline, and the dignity and jurisdiction of its ministers. The first article maintains all ordonnances, edicts and declarations in favour of the ecclesiastics of the kingdom, "*concernant leurs droits, etc., jurisdiction volontaire ou contentieuse.*" Then art. 24 is as follows:

XXIV. "*Les Archevêques et Evêques pourront avec les solemnités et procédures accoutumées ériger des cures, dans les lieux où ils l'estimeront nécessaire. Ils établiront pareillement suivant notre déclaration du mois de janvier* 1686, *et de celle du mois de juillet* 1690, *des vicaires perpétuels, où il n'y a que des prêtres amovibles ; et pourvoiront à la subsistance des uns et des autres 'par union de dixmes et autres revenus ecclésiastiques'; en sorte qu'ils aient aussi bien que tous les autres curés ci-devant établis, la somme de trois cent livres, suivant et en la forme portée par nos déclarations des mois de janvier* 1686, *et juillet* 1690." Edits de Néron—Louis XIV, avril 1695. Juris. de Off. 29.

There is nothing in any of the writers, to whose works we have had access, to show that this is the resuscitation of an original law which had been suspended. By the declaration of 1726, we find that a *curé primitif* may justify the existence of his parish by *Lettres-patentes du roi*, but he may also justify it by Bull, or *Decret de l'Archevesque ou de l'évêque ;* and Mr. Justice Beaudry tells us that the necessity for *Lettres-Patentes* for the *érection des bénéfices* was first introduced into France in 1743. Code des Curés, p. 25. This cannot affect us.

It seems, then, that the parish was in its origin the creature of ecclesiastical polity, that it formed itself, to some extent, on the existing civil institution of community, mark, or township ; that the civil law, in its turn, recognized the parish, and extended, or gave an opportunity of extending, its system.

Only one word remains to be said further on the ap-

plicability of Art. 24 of the Edit of 1795, to the case before us. Appellant does not contend that the Bishop had not performed his functions in the erection of the parish of Ste. Julienne *avec les solemnités* and *procédures accoutumées*; and, therefore, it would be out of place to enter upon this matter in a suit like the present, to which the Bishop is not, and, perhaps, could not, be made a party.

It may safely be affirmed that the positive law of France never differed substantially from what is expressed in Art. XXIV.

We thus see that by the canonical law there was nothing to prevent the Bishop from creating a parish in his own diocese; and that the law of France did not interfere with the canonical law in this respect, but that it constantly maintained the episcopal jurisdiction.

Perhaps it will be said that the bishop may create, but that he cannot touch what is created. The Edit of Dec. 1606, is decisive on this point: "*Avons ordonné et ordonnons que les archevêques et évêques, chacun en leur diocèse, pourront procéder aux dites unions, tant des bénéfices séculiers que réguliers, selon qu'ils jugeront être commode, et pour le bien et utilité de l'église: pourvu toutefois que ce ne soit du consentement des patrons et collaborateurs, et qu'ils ne touchent aux offices claustraux, qui doivent résidence aux églises desquelles ils dépendent.*" Néron vol. 1, Edit de Henri IV, Déc. 1606. Juris. des Off. p. 29.

The author of the "*Jurisdiction des Officiaux*," thus resumes the rights of the bishops as to *cures* and *bénéfices*: *Ils peuvent aussi créer de nouveaux bénéfices dans leurs diocèses, les unir; même de deux paroisses n'en faire qu'une, ou diviser une cure en plusieurs églises paroissiales.* (See also d'Héricourt, Lois Ecclésiastiques, part. 2, chap. 21; et Fevret, Traité de l'Abus, liv. 2, chap. 4, n. 10. Ordonnance d'Orléans, art. 16. Ordonnance de Blois, arts. 22 et 23.) The same writer adds "*à unir, supprimer ou réduire des fondations, lorsque les revenus qui y sont attachés sont si modiques, qu'on ne puisse plus les acquitter.*" Note 3, arrêt du 20 Jan. 1683. Duperrai, liv. 1, c. 15.

Having settled what a parish was, and by whom it

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might be created, we assume, without fear of contradiction, that the *curé en titre*, if there be one, is the *décimateur*. and this is *de droit commun*, by the civil as by the canon law. By the canon law, this has been shortly expressed: "*Decimæ praediales ecclesiae parochiali debentur.*" The civil law is not less energetic, and in more figurative language it is said, "*le clocher fait le titre du curé.*" By this title he excludes the *curé primitif*. That is, the title of the parish being established, the *curé's* title follows as a matter of course, and he can prove his *possession d'état* by witnesses, while, as we have seen, the *curé primitif* could not thus prove his right; *i. e.*, the *curé* not actually *desservant*, for he must have a title by *lettres patentes*, *bulle ou décret de l'évesque*. Pr. des Dimes, p. 135.

In this case the question is as to the legality of the canonical decree erecting the parish, and not as to the title of the *curé*, whose possession *d'état* is admitted; nevertheless, it is worthy of note, for it consorts with the law on the same subject passed specially for Canada nearly at the same time, and to which allusion will be made later, that where there is no reserve of the collation or presentation to a *bénéfice*, the Bishop may "*en disposer de plein droit.*" *Juris. des Officiaux* 28, quoting Com. of Duperrai.

Coming to the laws specially passed for this Province, two kinds have to be considered; first, the laws of the French *régime*; second, the laws passed under the English *régime*.

During the former of these periods it will be found, that in all essentials the legislation for La Nouvelle France was directed by the same policy, and followed on the same principles as the legislation for old France. And so we find the recognition of tithe as part of the fundamental law of the Province—the exercise by the State of its power to regulate the amount, the form in which it was to be paid, and the mode of its collection—the parochial system, the permanent *curé*, and his right to the tithe of his parish by the common law, exactly as in France.

And here it may be observed that the history of tithe in Canada is very easily mastered. It is not obscured by the

incidents of an institution slowly developed or incrusted with abuses. It came in as a portion of the common law. There is not a scrap of legislation to declare that tithe shall exist in Canada. Its perception was handed over to the Seminary of Quebec by the Bishop of Petrée, confirmed by the Lettres Patentes of the King, enregistered at Quebec on the 10 Oct., 1663. E. & O. p. Jugements et Dec. du Con. Souverain, 1, 18. This fixed the amount at 1-13th.

Evidences of the common character of the double legislation for France and for Quebec are so abundant as to be almost inexhaustible. It will only be necessary to point out a few of the more obvious examples.

We have the *Edit concernant les dimes et les cures fixes* (May, 1679), which no more assumes to introduce tithe than did the letters patent of 1663. The preamble of this *édit* declares the intention to be to provide for the building of churches and establishing parishes. Then we have it declared that the tithe shall belong "*entièrement à chacun des curés dans l'étendue de la paroisse où il est et où il sera établi perpétuel, au lieu du prêtre amovible qui la desservait auparavant.*" This Act then recognizes that the priest *desservant* a parish is the *décimateur*, exactly as in France. Then the *curés* are declared to be *inamovibles*, exactly as in the Decl. of 29 Jan'y, 1686 (Ed. Neron, vol. 2, 202); and, further, the tithes are to be levied according to the *règlement* of Sep. 4, 1667, 1 E. & O., 231.

Again, a great effort was made to get persons, and particularly the Seigniors, to grant land for and to build churches. This failed, and an *arrêt du conseil du roi accorde le patronage des églises à monseigneur l'evêque*, in consideration of his building churches in parishes where there were none (1 E. & O., 279), and so also in France the Bishop, who was *collateur ordinaire* (avril, 1695, 2 Neron, p. 266), nominated if the *patron* did not nominate in the proper delay.

Thus we see that the Bishop's right as *collateur ordinaire* stands out even more prominently in Canada than in France, because in Canada it was not limited by ex-

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ceptional interests vested in others, as was often the case in the mother country.

It may be said, this is all very well, but who makes the parish to which the tithe belongs? The appellant ought to answer—the King; but instead of that he says "the King AND the Bishop." If it had been said that it was the King alone, or the Bishop with his Council, or after calling in the patron, the *curé* and the people, the position might to some extent be defended; but that the erection of a parish so as to create a right to tithe was necessarily the joint act of the King and the Bishop is a proposition which it seems difficult to maintain. Appellant says:—A parish must have limits; to secure that required the concurrence of the civil and ecclesiastical authority, as is seen by the *règlement* of the Governor, Intendant and Bishop of the 21 Sep., 1721, confirmed by the King by arrêt 8 mars, 1722 (1 E. & O., p. 443.) That in France parishes were created by Lettres Patentes, and that in the same way they were created by Lettres Patentes here, and so, it is said, the *curés* of Montreal and St. Sulpice were united and incorporated to the Seminary of Saint Sulpice.

Doubtless a parish must have limits. This is a topographical necessity, just as a kingdom or a county must have limits. But it is not essential that limits should be designated for one purpose, as they are for another, although it may be convenient. Again, it does not seem to be questioned that the King could by Letters Patent create a parish under the old system. If he did so, and the Bishop appointed a *curé*, the *curé* could tithe the parish so constituted; but, as has been shown, this did not prevent the Bishop from constituting a parish or from dividing one already created, even by the King. The only restriction imposed by the civil law on the Bishop's authority was that he must respect existing rights—rights of the patron, of the incumbent and of the people, and the ordinary way in which the exercise of his powers could be questioned was by the *appel comme d'abus*.

The reference to the arrêt of 3 March, 1722, is not fortunate. A *règlement* was made by the Governor and In-

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tendant and the Bishop to give a better description of parishes already existing, and on the date named, the King's Council confirmed the *règlement*. Without doubt, this confirmation establishes a sanction of civil authority; it does not establish that such sanction is essential to give a legal right to tithe. To maintain appellant's proposition to any extent inferentially, it would be necessary to show that tithe was not collected in parishes not established civilly. As a matter of history, it was constantly collected by legal process where there was no special recognition of the civil parish. And no instance has been brought to our notice in which it has been held, that tithe could not be collected by process of law in parishes not civilly erected. Everything points the other way. For instance, what could be meant by the declaration of the *Edit* of May, 1679, that the tithes should belong entirely *à chacun des curés dans l'étendue de la paroisse où il est?* Was it that the tithe should be paid only to the *curés* of parishes civilly erected? Where were these parishes?

The year after this edict there is an *arrêt du Conseil Supérieur de Québec* (23 Dec., 1680), made in obedience to the King's command, directing the mode of farming the tithes "*des lieux joints pour composer une paroisse.*" (2 E. & O., p. 86.) Was this all done for imaginary *lieux joints civilement?*

In 1705 the *curés* of Beauport and L'Ange Gardien did not wish to be bound by the *règlement* fixing the tithe at the 26th measure of grain, and they were called to account and forbidden, as were all other *curés*, to exact tithe beyond the *règlement* of 6 Sep., 1667. This *arrêt* was pronounced on the 18th Nov., 1705, and it implies that these *curés* were entitled to the tithe fixed by law. However, their right does not rest on inference; on the 1st Feb., 1706, we find another *arrêt* declaring that they were entitled to tithe as fixed by law. (2 E. & O., p. 139.)

On the 27 March, 1713, there is an ordinance commanding the *habitans de Beaumont et de la Durantaye de porter la dime au presbitère de la paroisse de Beaumont.* (2 E. & O., p. 434.)

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On the same day, eight *habitans* were condemned to pay tithe to the church of the parish of Notre Dame de Foye, the tithe having been ceded to the church by Rev. R. P. LeBrun, a Jesuit, who had *desservi* the parish when the tithe accrued after the death of M. Saint Cosme, the previous *curé*.

These parishes do not seem to have been civilly recognized till 1721–2 by the *règlement* and *arrêt* already mentioned. (1 E. & O., p. 443.)

The reference to the affairs of St. Sulpice is even less happy. In 1702 the Seminaire de St. Sulpice, Paris, becoming alarmed at the edict of May, 1679, followed by the declaration of 1686, prayed the King to declare that it was not intended by the edict and declaration in question to affect their *communauté* at Montreal, which, through priests chosen by the superior, ministered to a parish *created by the Bishop*. The King assured them that the *édit* and declaration were not intended to include this parochial arrangement, and he gave them Letters Patent, in which it is affirmed that the Bishop of Quebec *had created the parish*. This is a singular mode of establishing that the Bishop could not erect a *cure* without the concurrence of the King.

We now come to English times, and here the appellant's hopes seem to revive. There has been much declamation about the subversive intentions of the new power; but no radical change seems to have been made. The most critical period was, of course, the years of transition until Parliament established a Government for the Province of Quebec, during which time it was governed as a Crown Colony, and that on the most general instructions. There was, however, nothing that could be properly qualified as a premeditated interference with the municipal law of Canada. Although all sorts of subtle meanings have been imagined as concealed under the non-committal proclamation of 1763, and the still ruder ordinance of General Murray of 1764, the dangers of a tyrannical interference have appeared greater to the successors than to the contemporaries of the General, and of the most honest of

Kings. Intentions are a doubtful quantity. Those are best which produce the most favorable results, and in 1774 we have proof of those that animated the persons who were sufficiently strong to prevail. The Quebec Act, passed that year, by its 5th section reiterates the promise of the treaty according the free exercise of the religion of the Church of Rome to the Roman Catholic inhabitants of the Province of Quebec, "and invests the clergy with their accustomed dues with respect to such persons only as shall profess the said religion." The reservation of the King's supremacy, as established by the Act in the reign of Queen Elizabeth, was a saving clause, to exclude the pretension of the Pope to establish Courts having executory powers over the King's subjects. It never had, or could have had, any practical application to a question like the present, or be the foundation of a right of nomination to, or interference with, benefices belonging to the Church of Rome. The suggestion that the object of the first statute of Queen Elizabeth's reign was to give the sovereign of England the supreme power to appoint Roman Catholic Bishops has almost the appearance of an historical joke. There were laws in England creating disabilities of various kinds directed against Roman Catholics. The inapplicability of these laws to the ceded Province was, therefore, stipulated for by the treaty, and the treaty stipulation was incorporated in the first constitutional Act. In short, the statute says: the Roman Catholic subjects of His Majesty shall have the free exercise of their religion, the clergy shall have their accustomed dues from Roman Catholics, but Courts having temporal jurisdiction shall not be appointed by ecclesiastical authority. Any quantity of padding may be added to these legislative facts; but it seems to me that what followed was their legal sequence. Were it otherwise, it would scarcely be a grievance that England had tortured her laws so as to give the widest signification to the treaty obligations.

It would have been a more plausible argument to say that the King of England was successor to the King of

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France, and as such inherited the right of presentation to Bishoprics. But the pretension that the King of England took the place of the King of France as to Canada is only true within certain limits. The King of England did not succeed to those rights, which were purely personal to the King of France, and so he had no rights under the treaties made by the King of France with other powers. Thus the *concordat* of 1516 was law in France, at all events from 1527, but by the cession of Canada, the *concordat* did not bind the Pope to the King of England, or the King of England to the Pope.

If George III, had interfered with the nomination of a Roman Catholic Bishop, he would have broken the pledge given by Parliament, "for the more perfect security and ease of the minds of the inhabitants of the said Province." Not having exercised the right to appoint bishops, could it be pretended that the king laid claim to the right to interfere with the parochial arrangements of the bishops, within their dioceses ? It is only necessary to formulate the proposition to see how untenable it is.

It would be tedious to examine critically the numerous statutes that have been passed to regulate the temporal affairs of parishes since the year 1839. One thing must strike any one conversant with general history, who has studied these statutes, and it is the influence of the old law on this legislation. Mr. Justice Beaudry draws special attention to it at the end of his preface, and on page 5, of his "Code des curés."

However, a definition of a parish, as resulting from that legislation, has been given in the work alluded to as article 9: "*La paroisse est le territoire délimité par l'autorité ecclésiastique avec confirmation par l'autorité civile, et dont les habitants sont administrés par son curé propre quant au spirituel, ou temporel par une fabrique pour les fins du culte, et par un ou plusieurs conseils municipaux pour tous les autres objets et besoins locaux.*"

In a note he gives the definition of a parish, taken from the "*Dictionnaire du Droit Canonique*" as: *Parochia est locus in quo degit populus alicui ecclesiæ deputatus, certis*

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finibus limitatus," and he adds, "*Cette définition est admise dans le droit, mais avec l'addition contenue dans l'article ci-dessus*," p. 31.

Dogmatic utterances of codes, like other definitions of the civil law, are very liable to be subverted. At any rate they can scarcely be taken as true in every sense. Now if it be intended merely to say, that in the civil law "parish" is usually intended to mean the parish recognized civilly, there is not much to cavil at, for probably the statute law is principally occupied with the parish civilly erected. But if it be intended to intimate that there is no parish known to the language of the civil law but that which is civilly erected, the proposition cannot be maintained. It is controverted by the very sections of the statutes invoked in support of art. 9. For instance cap. 18, C. S. L. C. sec. 8, is referred to, and there we find "the ecclesiastical authorities. . . . shall proceed, according to the ecclesiastical law and practice of the diocese, to the final decree for the canonical erection of *any parish* or the division or union, etc." Then section 15 refers to the proclamation of the governor "erecting such parish *for civil purposes*, and for *confirming*, establishing and recognizing the limits and boundaries *thereof*," of what? The civil parish. Then ch. 19, C. S. L. C., is cited. It gives powers to religious congregations which are not formed into parishes, to hold property, and provides for their succession. Then reference is made to the M. & R. act, C. S. L. C. c. 24, sect. 35. It reads "for the purposes of this act. . . . the following territorial arrangements shall be made"—*ergo* there is no canonical parish except those recognized civilly by the proclamation of the governor! The last quotation is from a school act.

It is idle to contend that there was no canonically erected parish, so the definition is not strictly exact; but it may be said that its erection created no legal relation except the right to move to get itself recognized. But where is this prescription of the law to be found? There must be something positive to upset the old law of France as applied to this country, and as Chief Justice

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Lafontaine said in *Jarret & Sénécal*, we are sworn to give effect to the laws of France. As we have seen, it was only in 1743 that, for the first time, an edict was passed in France requiring letters patent for the erection of *bénéfices*. This alteration in the law in 1743 could not affect Canada.

A decision in a case where registers were refused to a canonical parish has been referred to. It cannot have any analogy with this case. Whether the canonical parish has a right to a register or not I am not aware, but it is evident that the possession of a civil register, furnished by the Government under a statute, stands on a footing totally different from the common law right to tithe. But a doctrine is insisted upon by the learned judge, over and over again, in that case, which, if true, would decide this question, and be a ground for reversing the judgment in the present case scarcely invoked by the appellant. He says: "The Civil Government has alone the power to give, by its approbation, civil effects to canonical erections." And further: "The Civil Courts recognize no parishes but civilly erected ones." (2 Rev. Cr., 447.)

This doctrine appears to me totally inadmissible, either under the public law of France or under that of England. It might as well be said that no private act can produce civil effects. The true doctrine is that every act may, and generally does, create a civil relation, better expressed by the French term—*un rapport de droit*.

These notes have been drawn out to such length that the endeavour has been to avoid treating every question not strictly within the limits of the case before us. A word or two has been said on the question of registers, merely to note that the question of registers is governed by a statute and therefore is not identical with the question of tithe. To be intelligible, one is sometimes forced to go outside the strict logical limits of the question, and so in this instance my hand is forced, and at the risk of being thought tedious, what has been slightly noticed, must be treated and extended. It is no part of my opinion to maintain that inconvenience of a formidable

kind will not arise when the canonical decree is not confirmed or adopted by the state. What is maintained, is that the decree is not null, and that it binds as regards tithe, where there is no special law regulating the particular case. The argument *ab inconvenienti* is therefore inadmissible. This is by no means new. There is a declaration de Louis XIV, du 31 Janvier 1690, portant défenses aux marguilliers des fabriques, paroisses et confréries, d'entreprendre aucuns bâtiments sans permission du Roi. The canonical parish, without the confirmation by the state in Quebec, has no legal method of forcing its parishoners to pay for a new church or the repair of the old one. The bishop will therefore be obliged, unaided by the intervention of executive or judicial authority, to rely on the strength of his moral and religious influence.

The case of *Refour & Senecal* has attracted some attention. It was decided in the Circuit Court at St. Hyacinthe, in 1854, on demurrer. Defendant said, (1) the *desservant* of a mission cannot claim tithe; (2) the free and common soccage lands do not owe tithe. The first point was rejected; but the action was dismissed on the second demurrer. In so far as the successful ground of demurrer is concerned, the case is of no importance for it only decided a question arising on a statute. Thirteen years later, a judge in the Circuit Court at Three Rivers gave an opinion on the point at variance with the opinion in *Refour & Senecal*. When *Roy & Bergeron* (1) was decided, the question had been set at rest by the 20 Vic. c. 45, sects. 4 and 5. There remains however this much of *Refour & Senecal*, and it is this, that tithe may be exacted by the *desservant* of a mission. This supports the general reasoning insisted upon by respondent.

I am, therefore of opinion that tithe is due by the common law, that the common law has not been interfered with, that tithe is the property of the permanent *curé* or *desservant* of a parish, under whatever name he goes, that the *cure* of souls is validly conferred by a Bishop within his

(1) 2 R. L. 523.

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own diocese, and that by the decree of the Bishop, unreversed, the parish is created to which tithe attaches. Being of this opinion, I am to confirm, and this is the conclusion arrived at by the whole Court.

DORION, Ch. J., concurring, referred to the record of a case decided in the Q.B., Montreal, September, 1848, No. 356, *Messire T. Brassard* v. *Paul Bessener, fils.* In this case it was held, on a law issue, that the *curé* of the parish dismembered by canonical decree could recover for tithe in the new parish.

Judgment confirmed.

A. Charland, attorney for appellant.
Geoffrion, Q.C., counsel.
Ouimet, Cornellier & Lajoie, attorneys for respondent.
(J. K.)

January 25, 1886.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

JOSEPH GRÉGOIRE ET AL.,
(*Defendants in Court below*),
APPELLANTS;

AND

DAME JULIE GRÉGOIRE ET VIR,
(*Plaintiff in Court below*),
RESPONDENT.

Tutor and minor—Sale equivalent to rendering of account—Prescription—C. C. 2258.

HELD:—That a sale by a minor, emancipated by marriage, to her father and ex-tutor (without any account being rendered, but after the making of an inventory of the community existing between her father and mother) of her share in her mother's succession,—said sale containing a valuation of what was coming to her from her tutor—should be considered as equivalent to an account accepted and discharge granted, and therefore, under C. C. 2258, which is applicable to such cases, the action of the pupil to annul the sale is prescribed by ten years from majority.

The appeal was from a judgment of the Superior Court, district of Iberville (CHAGNON, J.), Oct. 19, 1883, maintaining the respondent's action.

Nov. 26, 1885.] *Paradis* and *Robidoux, Q.C.*, for the appellants.

Geoffrion, Q.C., for the respondent.

TESSIER, J :—

Il s'agit d'une action en reddition de compte de tutelle, dans laquelle la demanderesse, Julie Grégoire, a aussi conclu à faire déclarer nul un inventaire fait par son père, et une vente, ou dation en paiement, portant quittance des droits successifs mobiliers et immobiliers lui provenant de sa mère, Marie Dupuis, décédée en 1848.

La demanderesse Julie Grégoire s'est mariée en 1854. Par acte du 9 juillet 1855, son mari Thomas Girard et elle, communs en biens, ont reconnu avoir cédé au père de Julie Grégoire les droits successifs provenant de sa mère, y compris tout ce que lui devait son père comme son tuteur. Cette cession de droits paraît avoir été consentie en considération de la somme de $300.

Il appert qu'il n'y a pas eu de compte de tutelle rendu suivant la loi. Le père Joseph Grégoire, est décédé en 1881. Par son testament il a institué légataires universels ses deux fils. C'est contre eux que la demanderesse porte son action.

Entre autres exceptions, les défendeurs invoquent l'acte de vente ou dation en paiement du 9 juillet 1855, dans laquelle la demanderesse Julie Grégoire a donné quittance à son père pour tout ce qui pouvait lui revenir en biens meubles et immeubles dans la succession de sa mère Sophie Dupuis, et allèguent que s'étant écoulé près de 20 ans depuis sa majorité, il y a lieu à la prescription de dix ans contre la demanderesse.

Il n'y a pas de doute que si la demanderesse s'était pourvu par action prise dans les dix ans après sa majorité, elle aurait droit à ses conclusions.

Il faut donc examiner si c'est la prescription de dix ans ou celle de trente ans qui s'applique dans ce cas-ci, et re-

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concilier l'article 2243 C. C., qui déclare l'action en reddition de compte contre le tuteur prescriptible par trente ans, avec l'article 2258, qui déclare prescriptible par dix ans l'action en réformation de compte et celle en rescision de contrat pour erreur, fraude ou violence, et donner effet à ces deux articles. Celui qui accorde trente ans ne doit s'appliquer qu'au cas qu'il n'y a eu aucune transaction entre le père et ses enfants après leur majorité. Lorsqu'il n'y a eu aucune quittance par les enfants de leurs droits, alors il faut la prescription de trente ans contre l'action en reddition de compte, pure et simple ; mais lorsqu'il y a eu dation en paiement et quittance, il y a lieu à la prescription de dix ans. En effet, un acte de la nature de celui qui a eu lieu entre les parties en 1855, suppose une estimation de ces droits, une espèce de reddition de compte, peut-être informe, même seulement orale fondée sur l'inventaire en détail qui a précédé, mais en ce cas le majeur a dix ans après sa majorité pour revenir contre pareil acte, il a le temps de s'apercevoir, s'il souffre préjudice, s'il y a eu erreur, et il peut invoquer la nullité prononcée par l'article 311 du Code Civil. Mais peut-il pendant plus de dix ans, même pendant vingt-neuf ans, garder et peut-être dépenser ce que le père ou tuteur lui a remis pour représenter sa part dans le compte de tutelle, dans les droits successifs de sa mère et, sans préalablement remettre ce qu'il a reçu, demander une reddition de compte, même aux fils légataires universels du père, comme dans ce cas-ci. C'est, il me semble, contraire à l'article 2258 ; c'est demander une réformation de compte ; c'est demander de mettre de côté l'acte de dation en paiement de 1855, ce qui est clairement prescriptible par dix ans. Or si vous ne pouvez faire mettre de côté la quittance que vous avez donné, vous n'avez plus droit de réclamer ce qui a fait l'objet de cette quittance.

On dit que la disposition contenue en l'article 311 est d'ordre public, et qu'on ne peut pas l'enfreindre. Ce raisonnement s'appliquerait aussi bien contre la prescription de trente ans que contre celle de dix ans. Un contrat entaché d'erreur, de fraude, de violence, n'est-il pas contre

l'ordre public ? Cependant la loi en prescrit l'annulation par dix ans. Pourquoi n'appliquerait-on pas cela aussi bien à une dation en paiement et quittance, de bonne foi en apparence, comme dans ce cas-ci ?

Les codificateurs ont cité la cause de *Moreau & Motz* qui a beaucoup d'analogie avec celle-ci. Les juges de la Cour Supérieure avait maintenu qu'il y avait lieu à la prescription de trente ans ; ceux de la Cour d'appel, parmi lesquels étaient les juges Lafontaine, Caron, Mondelet et Short, ont maintenu la prescription de dix ans. Leur jugement a été confirmé par le Conseil Privé. Le juge Lafontaine a cité de nombreuses autorités pour appuyer son opinion. On trouve le rapport de cette cause au 7e vol. Décisions des tribunaux du B.-C., p. 147, et 10 vol. p. 84.

L'hon. juge Lafontaine s'exprimait comme suit (p. 167) : " Des actes de la nature de ceux dont il s'agit, en suppo- " sant qu'ils puissent être attaqués, ne sont pas nuls de " plein droit, ils sont seulement annulables, ou sujets à " rescision. Nul doute que l'action fondée sur leur annu- " labilité ne dût être portée dans les dix ans. L'appe- " lante est bien fondée à invoquer cette prescription dans " les circonstances de la cause. Les décharges de comptes " de tutelle, quoique données *non visis tabulis, non disjunctis* " *rationibus*, ne peuvent plus être attaquées après les dix " années de leur date, postérieures à la majorité, suivant " les arrêts rapportés par MM. Louet et Brodeau, son an- " notateur, sous la lettre T, sommaire 3, ce temps ayant " été jugé suffisant pour que le mineur devenu majeur " pût examiner s'il avait été lésé. La jurisprudence du " Parlement de Paris est que le mineur doit se pourvoir " dans les dix ans de sa majorité, contre la transaction " faite avec son tuteur avant le compte, et *non visis tabulis*, " sinon, qu'il est non recevable après les dix ans." (Ancien Dénisart, au mot " Tutelle," p. 148, Nos. 103, 106).

Larombière, art. 1304, No. 40, p. 62 :—" Ce qui nous " confirme dans notre opinion, c'est que dans notre an- " cienne jurisprudence, le pupille qui avait traité avec " son tuteur, sans examen de comptes et sans communi-

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" cation de pièces justificatives, avait, aux termes de l'or-
" donnance, dix ans du jour du traité pour s'en faire re-
" lever par entérinement des lettres de rescision." Ordonnance de 1539, art. 134; Meslé, De la minorité, pp. 492, 493.

Argou, tome 1er, édition de 1787, p. 68 :—" Toutes les " transactions faites entre le tuteur et le mineur devenu " majeur, sur la question de la tutelle, sont nulles, et le " mineur peut s'en faire relever *dans les dix ans*, à moins " que les comptes n'aient été examinés, et que toutes les " pièces justificatives n'aient été mises entre les mains du " mineur."

Rousseau de Lacombe, *vo.* Restitution, s. 1re, No. 4 :— " Mineur n'est recevable à se pourvoir après les dix ans " de la majorité contre la transaction faite avec son tuteur " avant le compte et *non visis tabulis*."

Pothier, Bugnet, 10 vol., p. 357, No. 745.

Il est bon de remarquer que l'inventaire comprend le détail de l'actif et du passif des biens de la communauté et de la succession de la mère, ce qui a dû rendre facile l'estimation de ce qui revenait à l'intimée de la gestion de son père et tuteur.

Il reste bien une autre exception offerte, c'est que la femme seule a porté cette action, simplement autorisée de son mari. Or elle réclame un compte comprenant sa part de succession mobilière et immobilière. Quant à la partie mobilière, le mari, comme chef de la communauté, est seul maître de cette action, et il devait être demandeur en cette instance. Cependant cette obligation n'a pas besoin de solution ici, parce que cette cour décide la cause sur le point principal de contestation entre les parties qui emporte le débouté de l'action et le maintien de cet appel.

MONK, J. (*diss.*) concurred in the judgment of the Court below on every point.

RAMSAY, J. :—

The first question that arises in this case, is whether the action is prescribed by ten or by thirty years. The

action is to have declared null a pretended inventory made by the father of respondent, also her tutor, of the community existing between her father and mother, to set aside a sale, so called, or an act equivalent to sale, and to render an account of a tutorship. By article 2243 C. C., the prescription of the action to account, and of the other personal actions of minors against their tutors, relating to the acts of the tutorship, takes place at the end of 30 years from the age of majority. But by article 2258 C. C., the action in restitution of minors for lesion, the action in rectification of the tutor's account, and that in rescission of contracts for error, fraud, violence or fear, are prescribed by ten years. The time for this prescription only runs from the age of majority and from the discovery of the error or fraud. The respondent only attained to the age of majority in 1858, and therefore, the thirty years prescription had not been acquired, if that be necessary. We have therefore to examine under which article the present action falls. In a sense, it cannot be denied that this is a personal action of the minor, relating to the acts of the tutorship ; but the subsequent article appears to limit the generality of the former and to reduce the time of prescription, where the question was not doing but rectifying. That is to say, prescription will not cover an actual omission to do, until 30 years have elapsed ; but after 10 years have elapsed, lesion and even error, fraud and violence, cannot be enquired into. This seems to me, to be a very tangible and very reasonable distinction. It should require a longer space of time to efface rights that have never been settled, than to destroy a settlement on which all the important transactions of a life may have been carried on. The law recognizes the *déclaration de volonté* (legal *consent*), not " validly given," so far as to subject the contract it seems to sanction, to a shorter prescription than the original obligation to account. The present case shows the importance and wisdom of the rule. An inventory is made imperfectly, it is acted upon, and after twenty years perfect acquiescence, for this is admitted by respondent's factum (and the reason is given the desire

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to profit by the tutor's good will), the party acquiescing tries to set the inventory aside on a question of form.

It is, however, contended that it is an absolute nullity under the code.

In the case of *Motz & Moreau*, it was held in the Superior Court, "that all transactions, quittances, and discharges which have taken place between a tutor and minors who have become of age, founded upon such incorrect and fraudulent inventory, are null *de plano*." And so also, "without accounts being rendered, and without production of vouchers." The Court of Queen's Bench held, reversing the decision of the S. C., "that the action *en nullité* brought by the respondent, was prescribed by the period of ten years, since the passing of the deeds complained of," 7 L. C. R. 147. This was in March, 1857, and consequently before the code. The Privy Council confirmed the judgment; but it is fair to state, without affirming the doctrine of the ten years prescription, 10 L. C. R. 84. (1) Since then, however, there was the case of *Sykes & Shaw*, where the ten years prescription was explicitly maintained. This was also before the code. 15 L. C. R. 304.

In December, 1879, (and consequently since the code) there was an appeal from a judgment of the Superior Court, ordering an account, where it appeared that the administrator of the minor's estate had rendered an account, and got a discharge without observing the formalities of the code. *Pierce & Butler*, Dec., 1879. (2) Two

(1) The P. C. appears to have been drawn into considering the question of how an absolute nullity may be got over, to the exclusion of the real question in the suit. This indirect way of getting at the rights of parties, raises quite a different order of ideas, and puts in question legal relations foreign to those adjudicated upon by the Courts here. There is *du vrai et du faux* in all the doctrine read to their Lordships, with which it is unnecessary now to deal.

(2) In this case the learned Chief Justice of this Court is reported to have said: "The Court was of opinion that the nullity referred to in Art. 311 of the Code, was a relative nullity which should be invoked. The minor could ask to be relieved from such a transaction, but could not *de plano*, ask for another account while the discharge existed. The Court had already held this in *Riendeau & Desgroseilliers*. In that

years before, there was a similar decision in the case of *Riendeau & Desgroselliers*, 1877. (3) It has been said, that the Court should not sanction what the law reprobates. This argument, in spite of its apparent force, is not conclusive. Error, fraud and even violence are covered by the prescription of ten years ; and if the thing be an absolute nullity, it is idle to discuss whether the prescription be of ten or of thirty years.

There was a question as to whether this action brought in the wife's name, the husband being a party only to authorize his wife, was properly brought. There is a motion by the husband to be allowed to come in to take

case, there had been a settlement. Then, on the ground that there had been fraud, an action was brought for another account without mentioning the first account, and the Court held that the action could not be maintained in that form. In the present case, the Respondent treated the first account as a perfect nullity, and there was no conclusion for setting it aside. On this ground, the appeal would be maintained, and the action dismissed."

The *considérant* of the judgment is as follows :—

"Considering that the female Respondent has, by her attorney, acknowledged by Act of the fifteenth day of April, eighteen hundred and seventy, passed before C. A. Richardson, Notary, acknowledged that her late father, Isaac Butters, had rendered her a true and faithful account of his administration, which he had as Tutor to the said female Appellant, of the property of the said female Respondent. and had paid unto her the sum of twelve thousand five hundred dollars ($12,500) as the balance or residue of said account for which, through her said attorney, she gave the said Isaac Butters a full and complete discharge, which Act was subsequently, to wit, on the fifth day of May, eighteen hundred and seventy, duly ratified by the said female Respondent;

"And considering that the said female Respondent cannot claim another account from the representatives of the late Isaac Butters for his administration as Tutor of her property, without first demanding that the said discharge, so given by her said attorney and ratified by her as aforesaid, be set aside and declared null and void;

"And considering that the female Respondent has instituted the present action without having first demanded the resiliation of the said discharge of the 15th day of April, 1870, and of the said ratification of the 5th day of May, 1870."

(3) The *considérant* of the judgment is as follows :—

"Considérant de plus, que la demanderesse-intimée ne pouvait demander au défendeur-appelant une reddition de compte, sans en même temps demander à ce que le compte déjà rendu par le dit défendeur-appelant et accepté par la demanderesse-intimée assistée de son curateur, fût mis de côté et qu'elle fût relevée de son acceptation."

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up the instance. The opinion of this Court as to this matter is sufficiently expressed in the cases of *Bélanger & Talbot*, 3 Dec. d'App. 317 ; and *Conte & Legacé*, Ib. 319. I therefore think that the husband should be *en cause* in his own name in as far as the action is *mobilière*, and I think his motion to be allowed to intervene should be allowed *sans retardation de cause*. This point is not essential, as we are deciding the merits of the case, and as it is another reason for the dispositive of the judgment. I therefore, do not think it necessary to express a dissent on this point and I concur in the judgment of the Court.

The judgment of the Court is as follows :—

" La Cour, etc.—

" Considérant que par son action, l'intimée demande à faire prononcer la nullité de l'inventaire de la communauté qui a existé entre ses père et mère, Joseph Grégoire et Sophie Dupuis, fait par le dit Joseph Grégoire devant Lukin, notaire, après le décès de la dite Sophie Dupuis et sa nomination comme tuteur à ses enfants mineurs, à raison de certaines irrégularités qui se seraient produites dans la confection du dit inventaire, et en particulier de l'omission du notaire d'avoir fait signer la dernière vacation par le dit Joseph Grégoire, le dit inventaire commencé le 24 juillet 1848, terminé le 28 septembre et clos en justice le 24 octobre de la même année ;

" Considérant que l'intimée demande aussi à faire prononcer la nullité d'une vente faite par elle, alors mineure, mais émancipée par mariage, agissant conjointement avec son époux Thomas Girard, au dit Joseph Grégoire, son père et ex-tuteur, le 9 juillet 1855, devant Merizzi, notaire, de la totalité de ses droits mobiliers et immobiliers dans la succession de sa mère, desquels biens le dit Joseph Grégoire avait eu la gestion comme tuteur, mais dont il ne lui avait rendu aucun compte en forme légale ;

" Considérant que l'intimée demande en outre par son action que les appelants soient condamnés à rendre compte de la tutelle et gestion du dit Joseph Grégoire, maintenant mort, ce qui comprend les mêmes biens qu'elle a cédés par le dit acte du 9 juillet 1855 ;

" Considérant que l'inventaire fait par le dit Joseph

Grégoire, père, est valable, et que l'omission relevée par l'intimée est couverte par le fait que le dit inventaire a été clos en partie et que l'intimée a tacitement acquiescé à la preuve faite de la dite clôture en justice, en omettant de demander spécialement et en temps opportun le rejet de cette preuve, laquelle est suffisante *primâ facie ;*

" Considérant qu'il s'est écoulé plus de trente ans entre la confection du dit inventaire et la présente action, et que la prescription de dix ans s'applique à ce cas-ci, et qu'il n'y a plus lieu à demander l'annulation du dit inventaire ;

" Considérant que la vente des droits de l'intimée dans la succession de sa mère, faite par l'intimée et son mari, communs en biens, quoique non précédée de reddition de compte en forme légale, équivaut à une estimation de ses droits et à une quittance et décharge par le mari de l'intimée, comme chef de la communauté, et par sa dite épouse l'intimé, auxquels le compte de tutelle était dû, et que pour obtenir une condamnation contre les défendeurs à rendre un compte, il est nécessaire et essentiel de mettre de côté et annuler la dite vente équipollent à une quittance des droits réclamés dans la présente action, et qu'il s'est écoulé plus de dix ans avant la présente action, laquelle est en conséquence prescrite ;

" Considérant que la dite vente comprend dans le prix de $300, l'estimation et compte de ce que les parties ont considéré être le montant revenant à l'intimée par la gestion de son père et tuteur, et que les détails de l'actif et du passif du dit compte se trouvaient faciles à constater et ont dû être constatés par l'inventaire clos le 24 octobre 1848, ce qui équivaut à un compte informe, dont la demanderesse ne peut demander la réformation après dix ans écoulés depuis sa majorité et sans offrir de remettre au préalable ce qu'elle reçu," etc.

Appeal maintained, action of respondent declared prescribed by ten years and dismissed with costs in both courts. Monk, J., dissenting.

Paradis & Chassé, attorneys for appellants.

Geoffrion, Rinfret & Dorion, attorneys for respondent.

(J. K.)

March 27, 1886.

Coram DORION, Ch. J., MONK, RAMSAY, CROSS & BABY, JJ.

ROLLAND

(*Plaintiff below*),

APPELLANT;

AND

CASSIDY

(*Defendant below*),

RESPONDENT.

Arbitration—Mediators—Irregularities—Acquiescence.

HELD:—Where the parties agreed to submit their differences to arbitrators and mediators, and notwithstanding serious irregularities on the part of the mediators, proceeded with the arbitration, that it was too late to complain of the irregularities after the award was rendered.

The appeal was from a judgment of the Superior Court, Montreal, TORRANCE, J., Jan. 30, 1884, dismissing an action to set aside an award of arbitrators and *amiables compositeurs*. The judgment is reported in 7 *Leg. News*, p. 70.

Jan. 19, 1886. *J. L. Archambault, Q.C.*, for Appellant. *Lacoste, Q.C.*, for Respondent.

CROSS, J.:—

In this case Rolland sues Cassidy to set aside an award of Arbitrators and *amiables compositeurs* rendered on a submission made by them. Cassidy sues Rolland for execution of the same award, which was favorable to him. The two cases were united and one judgment rendered in the united cases, by which Rolland's action was dismissed, and Cassidy's conclusions were granted, awarding him judgment for the amount of the award in his favor. Rolland has appealed from the judgment, and Cassidy defends it.

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By the submission executed before Leclerc, notary, the 21st Nov., 1881, it was declared that from the 9th Nov., 1874, they had been partners as dealers in wood with Adolphe Roy, who became insolvent the 23rd Oct. 1878, from which date they two had continued the business; that to regulate the affairs and settle the accounts of the partnership, they agreed to refer the same to arbitrators and *amiables compositeurs*, Rolland choosing for the purpose, George Arthur Grier, and Cassidy, Louis Tourville, which two had chosen as third, James K. Ward, who were all three to be sworn before a Commissioner of the Superior Court, who were to take communication of documents, and were empowered to examine, under oath, the parties and their witnesses to determine the balance of account that one might owe the other, neither party to be represented by advocate or attorney before the arbitrators; the award to be submitted to, under a penalty of $5,000, to be paid by the party failing to conform, to the consenting party, before the award could be disputed.

Rolland, in his pleadings, made a series of objections to the award, as to its sufficiency in point of form, and regularity, without offering to pay or deposit the $5,000.

Cassidy answered these objections, claiming first that the $5,000 should have been paid, or deposited, before Rolland should be permitted to try the validity of his objections: and if even he could be heard on his objections, they were all unfounded and insufficient to affect the validity of the award. It may be at once remarked as regards the necessity for the payment or deposit of the penalty, if the award should prove a nullity as to form, there could be no necessity for the payment or deposit of the penalty, which could only be exacted in case of contesting the award on the merits. This principle is clearly recognized by Art. 1354, C. P. C.

The award was rendered the 13th May, 1882, within the time agreed upon, as extended by the consent of parties. It decreed Rolland to be indebted to Cassidy in the sum of $11,094.12½, with interest from 29th April, 1882. It was acquiesced in by Cassidy, and signified upon Rolland.

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The objections to its form made by Rolland were thirteen in number :—

1. The arbitrators were not sworn, as required by the *compromis* submission.

2. They did not hear the parties nor their witnesses after being sworn.

3. They neglected to swear the witnesses, as required by law and the terms of the *compromis*.

4. They took no regular notes of the evidence, and employed stenographers without being authorized to do so.

4. The notes taken were irregular and not certified.

6. They refused to hear Rolland's witnesses.

7. They, particularly Ward and Tourville, acted with partiality, and with a purpose of deciding in favor of Cassidy.

8. Tourville and Ward permitted Cassidy to be represented by his lawyer, contrary to the terms of the *compromis*.

9. They took private explanations from Cassidy in Rolland's absence.

10. They consulted Cassidy's legal adviser, in his presence, as to the questions in the case.

11. It was understood that neither party should be assisted by his lawyer, and Cassidy violated this condition.

12. The award was based on incomplete and imperfect documents.

14. The majority of the arbitrators treated Rolland as an agent and not as a partner.

Giving these objections our best consideration, we have come to the conclusion that none of them are sufficiently supported to enable them to prevail. There is no doubt that one of the arbitrators did not, in all respects, act with that prudence and scrupulous regard to propriety which would have been most becoming under the circumstances, but we think they all acted in good faith and conscientiously. They bestowed great pains and labour on their work, and have made a very well digested report on the matters submitted to them. I think Tourville would have

exhibited greater propriety by not visiting the office of the legal adviser of Cassidy, as it is proved he did, or making enquiry, as regards any legal points, of the lawyer of either party, but, at most, they seem to have desired merely to satisfy themselves on an abstract question of law, on which the arbitrators did not come to a wrong conclusion, an enquiry which any arbitrator may fairly make, and being *amiables compositeurs* they were, by law and according to Art. 343, C. P. C., dispensed with very strict observance of formalities. There is really not much substance in the objections, and if even some of them might at first bear a serious aspect, they were not so, at the time, viewed by the parties themselves; both parties proceeded without making objections at the time when such objections might have been considered opportune, and both parties availed themselves of the assistance of their respective legal advisers, although neither was represented by a lawyer before the arbitrators. It may be worth while to review some of the objections *seriatim*. The first is unfounded. The arbitrators in their award certify that they were sworn before a Commissioner, as required by the *compromis*. This is proved by a certified copy of the oath by the notary who took the written oath in deposit with the original award, a proof not objected to at the time, and which should stand. The second, I consider, is unfounded in fact. The third, equally so. The witnesses were sworn by the arbitrators. They have the power of experts, and should follow the same procedure. See Art. 343, C. P. C., and by Art. 334, C. P. C., experts are authorized to swear the witnesses. Any slight irregularity, if any, with regard to the notes of evidence, must be considered covered, for want of objection at the time, and from the arbitrators' quality of *amiables compositeurs;* besides they both took part in the proceedings, especially the examination of the witnesses. The remainder of the objections are unfounded in fact, as regards anything like legal sufficiency. I have already noticed the pretence of having employed lawyers, which was not done to the extent of a violation of the terms of the *compromis* and the visits of one of the arbi-

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trators to the office of the legal adviser of the gaining party, which, though imprudent, has no great significance, especially as affecting the conduct of men of very high standing. On the whole, we find nothing so serious as to affect with nullity the award of the arbitrators, and we think it ought to be confirmed. The judgment of the Superior Court will therefore be affirmed.

RAMSAY, J.:—

I concur in the judgment on the principle of acquiescence only. In almost every case it is safer to trust to an organised system rather than to an unorganised system. This applies to arbitrations more than to anything else. There have been deplorable irregularities in this case, and if the party now complaining had chosen to withdraw he would have been right in doing so. But he was willing to go on, and did go on, and it is too late after the rendering of the award, to take advantage of the irregularities.

DORION, Ch. J.:—

In this case three merchants went out of their ordinary business and formed a partnership for the sale of lumber. As often happens in such cases where persons embark in a new business, there was a considerable loss. One of the parties had been bought out, and the other two (who are the plaintiff and defendant in this suit) could not agree as to the settlement of the accounts. They had been on friendly terms, and they wished to settle their dispute as quietly as possible. They selected three of the most respectable men in the city of Montreal as arbitrators and *amiables compositeurs*. I suppose no three men better adapted for the purpose could have been found in the city. In the arbitration bond it was stipulated that the parties should not be represented by lawyers before the arbitrators. They wanted to conduct their case themselves. The arbitration proceeded. There were irregularities, and one which would be fatal was this: that in the absence of one of the arbitrators, two of them were

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taken to obtain the opinion of the lawyer of one of the parties. Even if there had been no stipulation that counsel should not be heard, this would annul the arbitration altogether. I express my opinion strongly that this would be fatal to the award. But in the present case we find that the other party did very nearly the same. Moreover, the opinions of the lawyers were put before the arbitrators. The party who now complains of the award stated that he still had confidence that the arbitrators would do justice. We think, therefore, as the parties depended on the arbitrators to do justice, and as no complaint of any irregularity was made at the time, and the arbitrators were not conscious that they were committing any impropriety in seeing counsel, and acted throughout in good faith, that under the circumstances the appellant has waived the right to complain, and therefore the judgment maintaining the award must be confirmed.

Judgment confirmed, Monk, J., *diss.*

Archambault, Lynch, Bergeron & Mignault for appellant.

Lacoste, Globensky, Bisaillon & Brosseau for respondent.

(J. K.)

January 27, 1886.

Coram DORION, C.J., RAMSAY, TESSIER, CROSS & BABY, JJ.

ROBERT EVANS ET AL.,
(*Defendants in Court below,*)
APPELLANTS;

AND

NAPOLÉON MONETTE,
(*Plaintiff in Court below,*)
RESPONDENT.

Master and Servant—Accident to Servant—Responsibility of Employer.

The defendants were constructing a building in the City of Montreal, and at their solicitation, men (of whom the plaintiff was one) were sent by

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the Corporation to introduce water from the street by a pipe connecting with the building. This could not be done without working inside as well as outside. A man passing along the wall, above where the plaintiff was working at the pipe hole, loosened and started a brick in the wall, and the brick, falling down, injured the plaintiff. A hammer had fallen previously and warning had been given to the men above.

HELD (RAMSAY & CROSS, JJ., *diss.*):—That the burden of proof was on the defendants to rebut the presumption of negligence, and this not having been done, the defendants were liable.

The action was brought by the respondent, to recover $350 damages for an injury received while working in a house which the appellants were erecting at the corner of Craig Street and Victoria Square, in the City of Montreal. The accident, it was alleged, occurred owing to the negligence of appellants' workmen.

The case came in the first instance before Mr. Justice Mathieu in the Superior Court, who dismissed the action for the following reasons :—

"Considérant qu'il résulte de la preuve que les défendeurs et celui qui était chargé de conduire l'ouvrage pour eux n'ont pas été avertis que le demandeur et ses compagnons allaient travailler en dedans de la bâtisse mentionnée dans la déclaration du demandeur, et qu'il n'est pas non plus prouvé que l'homme qui a accidentellement fait partir la brique qui est tombée sur le demandeur ait su que ce dernier travaillait au-dessous de lui ;

"Considérant qu'aucune faute n'a été prouvée contre les défendeurs, et que, pour cette raison, ces derniers ne peuvent être responsables du dommage réclamé par le demandeur."

The case was then taken to Review, where the judgment was reversed, SICOTTE, TORRANCE and LORANGER, JJ., Jan. 31, 1885.

TORRANCE, J., made the following observations:—

"Action of damages for personal injuries. Plea of contributory negligence. The action was dismissed for want of proof. As I read the evidence, I would have given damages $225. Defendants were constructing a

building. At their repeated solicitations, men were sent to introduce water from the street, by a pipe into the building, which could not be done without working inside as well as outside. A man passing along the wall high above where plaintiff was working at the pipe hole, loosened and started a brick in the wall. The brick fell on plaintiff. A man above had already let fall a hammer, and warning had been given to the men above. The work at which the plaintiff was employed was dangerous from the other men working above. The evidence of particular facts is very vague and general. I think, with plaintiff, that the burden of proof was upon defendants to rebut, if possible, the evidence of facts telling in favour of plaintiff. They have not done so. I would reverse and give $225 damages, with costs of both courts.

The judgment in Review was as follows:—

"La Cour, après avoir entendu les parties par leurs avocats respectifs, sur la demande du demandeur pour révision du jugement rendu par la Cour Supérieure de ce District, en la présente cause, le huit de Juillet 1884, examiné le dossier de la procédure dans la dite cause, et pleinement délibéré;

"Considérant, en fait, que le deux Novembre 1883, le demandeur travaillant comme journalier à des travaux commandés par les défendeurs, pour et dans une bâtisse qu'ils faisaient construire, a été blessé par une brique tombée sur sa tête par le fait d'autres travailleurs employés par les défendeurs;

"Considérant, en fait, que le demandeur a été rendu incapable, pendant plusieurs mois, par les blessures qui lui furent alors infligées, de vaquer à son travail ordinaire et de pourvoir au soutien de sa famille, et qu'il a souffert un dommage considérable;

"Considérant que les travaux ainsi commandés par les défendeurs étaient pour leur utilité et profit, et dont le coût était payé par eux;

"Considérant que le travail fait par le demandeur était chose connue par les défendeurs et leurs préposés et autres travailleurs, comme devant se faire à l'intérieur de leur construction et avec toute la promptitude possible;

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"Considérant que les défendeurs étaient tenus de préparer et régler leurs autres travaux de manière à garantir protection et sûreté au demandeur ainsi employé à faire un travail d'urgence commandé par les défendeurs;

"Considérant que le demandeur faisait un travail de creusage dans le sol, qui l'empêchait de voir ce qui pouvait être fait au-dessus de sa tête; et qu'il avait droit de compter que le maitre et ceux qui le représentaient donneraient tels ordres que requis pour que le demandeur ne fût pas exposé à être écrasé, ou assommé, à raison des travaux qu'on pouvait faire au-dessus de sa tête;

"Considérant que le demandeur, tant par lui-même que par ceux appelés à donner assistance pour le travail spécial qu'on lui avait commandé, ont prévenu ceux qui étaient au-dessus, de faire attention pour éviter qu'il ne tombât sur leur tête des choses qui pourraient les blesser;

"Considérant que le demandeur a fait tout ce qu'un travailleur, dans sa situation, devait faire;

"Considérant que les défendeurs n'ont pas pris les précautions nécessaires pour prémunir le demandeur contre l'accident et l'injure dont il se plaint, et partant qu'ils sont responsables du tort causé;

"Considérant que les dommages soufferts par le demandeur, tant pour le gain qu'il a manqué de faire durant la période indiquée et constatée, que pour les dépenses occasionnées par le fait de sa maladie, sont de la somme de $225 au moins, et que, par conséquent, il y a erreur dans le susdit jugement du huit Juillet dernier qui a renvoyé l'action du demandeur; Annule et met de côté le dit jugement du huit Juillet 1883, et procédant à rendre celui que la dite Cour Supérieure aurait dû rendre dans l'espèce; Condamne les dits défendeurs solidairement à payer au dit demandeur la sus-dite somme de $225, avec intérêt à compter de ce jour, et les dépens tant de la Cour de première instance que de celle-ci, distraits à Messieurs Ouímet, Cornellier & Lajoie, avocats du demandeur."

RAMSAY J. (*diss.*) :—

This is an action of damages by a workman against the

owner of a house, for whose profit the plaintiff worked, owing to the fault of the owner. It seems that while the construction of a house belonging to defendant was in progress, the deputy-superintendant of the water-works, at the request of defendant, sent up a gang of men to lay a large water-pipe. While performing this operation, a loose brick on the top of the wall over where they worked, owing to another workman, employed above, setting his foot on it, fell and struck plaintiff on the head, inflicting a severe wound. In the Court of first instance, the action was dismissed, but this judgment was reversed in review.

Many of these cases are difficult, because the question of fault is not easy to prove ; but there is another kind of embarrassment, which it seems to me, might readily be overcome. It is the sentimental one. However pleasant it may be to dispense one's neighbour's money in works of benevolence, it has nothing to recommend it morally or legally. The employer of labour is not the insurer of his workman against fortuitous events or against his own fault. The employer is obliged to indemnify the workman against the fault of the employer, This obligation is carried to its fullest extreme under our law, and properly so, in order to make it the interest of the employer to use every possible precaution to avoid accidents ; but there is nothing to be gained by exaggerating this obligation and by holding him responsible for events which he could not foresee. This case appears to me to be singularly free from difficulty. A gang of men go to work in a place of manifest danger. There are people working above them and no protection is placed to prevent an accident, such as the one that happened, although plenty of material was at hand. The workmen, who came last, saw the danger to which they were exposed, but they went on with their work. A hammer fell, it fell between the plaintiff and the man working with him, who threw it back to the workman who let it fall, and joked with him as to the danger. Undisturbed, they continued their work, and a little later, the brick fell and wounded Monette, as has been described. Now

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where is the fault of appellants? Could plaintiff have maintained an action against the man who set his foot on the brick? If not, he has no action against appellants.

Negligence is in plaintiff, and he should stand the consequences.

I am to reverse.

Cross, J. (*diss*):—

I think the injury complained of was the result of pure accident. It was the duty of the men working underneath to exercise caution. There was no *faute* on the part of the employer. The conclusion of the majority of the Court, amounts to this: that the master guarantees the safety of his employees. There is no ground in law for this, and the effect of establishing such a doctrine would be that an employer could not conduct himself in such a way as to avoid responsibility for accident.

Tessier, J.:—

I think this case is one of the clearest that has come before this court, and that it is difficult to arrive at any other conclusion than that the judgment should be confirmed. The appellants requested that men should be sent to perform the work, and by doing so they made themselves responsible that the house was in a safe and proper condition for the execution of the work. The law holds the master responsible, not only for the damage caused by his own fault, but also for that caused by the fault of those under his control. Wm. Knowland, one of the witnesses, states that a hammer fell down and nearly struck those below. He shouted up and said not to kill any more men in the building, as one man had been killed there already. It was after this that the accident to Monette occurred. There was certainly fault and negligence on the part of those overhead. Bricks do not fall of their own accord. The judgment holding the appellants responsible should be confirmed. In *Boulanger & G. T. R.*(1) this Court in October last decided in the same sense.

(1) 11 Q. L. R. 254.

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DORION, Ch. J., concurred in the judgment on the question of responsibility. But as to the amount of damages, the Hon. Chief Justice regretted to observe a tendency on the part of the Court below to grant excessive damages. It would be a hardship to the respondent to reverse the judgment for $100 or $125, but His Honour concurred with reluctance in an award of $225, which he believed to be far beyond what the evidence justified.

Judgment confirmed, Ramsay and Cross, JJ., diss.

J. A. A. Belle, for appellants.

Ouimet, Cornellier & Lajoie, for respondent.

(J. K.)

April 28, 1882.

Coram DORION, C.J., MONK, TESSIER, BABY, JJ.

GEORGE M. MACDONNELL ET AL.,
(*Plaintiffs contesting in the Court below,*)
APPELLANTS;

AND

PHILIP S. ROSS ÈS QUALITÉ,
(*Opposant in the Court below,*)
RESPONDENT.

Will—Construction—Substitution or Usufruct.

A Testator having bequeathed his estate as follows: . . . . "I leave all "my personal and real estate for the benefit of my wife and family "during her life if she remains unmarried to receive and apply such "funds as may be accruing out of it for the support and maintenance "of the family and educating them if she again marry her dower is "all that she will have out of the estate the rest to be equally divided "among the children my sons R. and W. I wish to enter the ministry. " . . . and I earnestly desire that every facility be given them to "get thoroughly educated. . . . "

HELD:—That this created a substitution of which the widow was institute and the children substitutes, and was not a case of usufruct to the widow and *nue propriété* to the children.

2. That though both widow and children had for years acted on the latter interpretation they were not thereby deprived of the right to urge the other interpretation now.

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Appellants obtained judgment against George A. Cowan, and caused to be seized by the Sheriff of Montreal, on *fieri facias*, as belonging to him one undivided sixth share of a lot of land, in Montreal.

Respondent, in his capacity of curator to Dame Eliza Cross, widow of the late William Cowan, father of said defendant, filed an Opposition *afin d'annuler*, whereby he recited the will of the said late William Cowan, the essential parts of which were as follows: "I leave all my "personal and real estate for the benefit of my wife and "family during her life if she remains unmarried to re- "ceive and apply such funds as may be accruing out of "it for the support and maintenance of the family and "educating them if she again marry her dower is all that "she will have out of the estate the rest to be equally "divided among the children my sons R. and W. I wish "to enter the ministry and I desire that every facility be "given them to get thoroughly educated." He then recited that by said will Mr. Cowan created a *substitution* of which Mrs. Cowan is the institute, and his children (of whom said defendant is one), the substitutes, and that, in consequence, defendant has at present no right of proprietorship in any part of the land seized, which is part of the estate of the deceased, but merely "the simple hope" of a substitute.

The appellants contested this Opposition contending that by said will no substitution was created in favor of Mrs. Cowan as institute, and the children as substitutes, but that a direct devise to the children was made of the *propriété*, subject to a usufruct by Mrs. Cowan until her second marriage or death. That under said recited will, Mrs. Cowan's rights were at most to have the property sold *à la charge* of her usufruct. That the registration of her right of usufruct under said will has never been renewed as required by C. C. 2172, and has thus been lost. That said Eliza Cross, and Opposant as her Curator, have never hitherto claimed a right of proprietorship, as now pretended, but have always admitted and acted on the basis that the property of said immoveable was and is

in the children of said William Cowan, and that the rights of said Eliza Cross were and are those of usufructuary only, and she and Opposant have become party to judicial proceedings and deeds on that basis (of which several are then cited and produced), and have thereby bound themselves to that position.

The plaintiffs produced numerous deeds in which Mrs. Cowan, her Curator and the children had continuously, until this proceeding, adopted the construction that the will gave her usufruct and to the children *nue propriété*. They also showed that the books of the estate had been and were still kept on that footing.

After argument and *délibéré* judgment was rendered at Montreal, the 7th Dec., 1880, by the Honourable Mr. JUSTICE CHAGNON, in the following terms:

"La Cour, etc.....

"Considérant qu'il appert suffisamment par le testament du nommé William Cowan, produit en cette cause, que ce dernier a voulu créer une substitution au profit de ses enfants, par le canal de Dame Eliza Cross, son épouse, et non un simple legs d'usufruit à cette dernière, et un legs de la nue propriété à ses dits enfants;

"Considérant qu'il appert suffisamment par le dit testament que la dite Dame Cross, dont l'opposant est le curateur, a été chargé par le dit testateur de conserver et de rendre aux enfants du dit testateur à la mort d'elle, la dite Dame Cross, ou dans le cas de son convol en un autre mariage, lors de tel autre mariage, les biens de la dite succession—créant par là même une substitution fidéicommissaire au profit des dits enfants comme appelés à la dite succession;

"Considérant qu'il appert suffisamment par le dit testament que le testateur n'a pas entendu limiter la dite Dame Cross à percevoir les simples revenus de ses biens tant mobiliers qu'immobiliers, pour les appliquer tant au maintien de la famille et d'elle-même qu'à l'education des enfants, en autant que le dit testateur, outre la charge générale qu'il impose à son épouse de maintenir la famille et de faire instruire les dits enfants, aurait spécialement

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mentionné au dit testament son désir à l'effet que deux de ses fils devinssent ministres, et aurait déclaré qu'il voulait qu'une éducation parfaite et complète fût donnée à ces deux enfants, et que toute facilité leur fût donnée aux fins de se procurer une telle éducation—expressions qui doivent contrôler la signification à donner aux mots dont se sert le dit testateur "*receive and apply such funds as* "*may be accruing out of it,*" et qui doivent démontrer que le testateur a voulu par ces mots autoriser sa dite épouse à se servir, pour le maintien de sa dite famille et d'elle-même, et pour l'éducation de ses dits enfants, de tous et tels fonds qui pourraient entrer dans les mains de la dite Dame Cross provenant de la dite succession ;

"Considérant qu'une autorisation du genre de celle susmentionnée s'infère encore des mots dont le testateur se sert "*I leave all my personal and real estate for the benefit of my wife and family during her life,*" c'est-à-dire pour le profit, bénéfice et utilité de la dite Dame Cross et de sa famille, le testateur déclarant qu'il voulait que deux de ses enfants spécialement eussent toute facilité pour se procurer une éducation parfaite et complète ;

"Considérant qu'une telle interprétation fait ressortir la pensée du testateur, lorsqu'il dit, plus loin, dans son testament, "*the rest to be divided among the children,*" le testateur voulant sans aucun doute donner par là à entendre qu'à la mort de la dite Dame Cross, ou dans le cas d'un autre mariage, lors de tel autre mariage elle était chargée de ne rendre, pour être partagée entre ses enfants, que ce qui lui resterait de sa succession, déduction faite des fonds dépensés pour le maintien de la famille et l'éducation des enfants, et aussi déduction faite, dans le cas d'un second mariage, de la somme qualifiée par le testateur du nom de douaire ;

"Considérant qu'il ne résulte pas du dit testament que ces mots du testateur "*the rest to be divided among the children*" ne doivent avoir d'application que pour le cas où, par suite d'un second mariage, la dite Dame Cross prendrait sur et à même la dite succession son douaire, ou la somme le représentant ; car avec une telle interpré-

tation, il faudrait dire que le testateur n'aurait pas pourvu à la disposition de son bien, après la mort de sa dite épouse, dans le cas où elle ne se serait pas remariée, tandis qu'il est évident par le contexte du dit testament, que le testateur a fait, pour le cas de la mort de la dite Dame Cross comme pour celui de l'éventualité d'un second mariage, une double disposition, au profit d'elle, la dite Dame Cros, d'abord, avec certaines charges, et ensuite au profit de ses enfants après sa mort, ou après son convol en un autre mariage ;

" Considérant que l'ensemble du dit testament exprime évidemment l'idée chez le testateur d'avoir voulu créer une substitution, et non un simple legs en usufruit au profit de sa femme, et de la nue propriété à ses enfants, le dit testateur pourvoyant suffisamment dans et par son dit testament à une double disposition, au trait de temps, à l'ordre successif et au droit éventuel de la dite Dame Cross, et la propriété des biens de la dite succession dans le cas où elle survivrait à ses dits enfants, tous signes caractéristiques de la substitution fidéi-commissaire ;

" Considérant qu'en étant d'avis que le dit testament a créé une substitution fidéi-commissaire, la saisie faite sur l'enfant du vivant du grevé, d'une part indivise dans les biens substitués serait nulle, l'appelé n'ayant encore qu'une espérance, et non un droit de propriété absolu dans les biens ainsi substitués ;

" Considérant qu'il n'appert pas que par les actes dont copies sont produites à l'enquête par les demandeurs, la dite Dame Cross ait jamais renoncé à la disposition faite à son profit par le dit testament, et considérant qu'au contraire elle s'est attribué dans les dits actes le titre qu'elle croyait alors lui résulter du testament lui-même ;

" Considérant que l'erreur de la dite Dame Cross ou des enfants du testateur sous ce rapport, ne peut leur préjudicier au point de faire perdre à la dite Dame Cross le benéfice des dispositions réellement énoncées et établies à son profit par le dit testament ;

" Considérant qu'en supposant que l'enregistrement du dit testament eût dû être renouvelé dans les délais fixés

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par la proclamation pour conserver à la dite Dame Cross les droits réels lui résultant du dit testament, telle nécessité de renouvellement n'eût dû exister qu'à l'égard, comme le dit l'article 2172 du Code civil, des autres créanciers ou des acquéreurs subséquents dont les droits auraient été régulièrement enregistrés ;

" Considérant que rien ne démontre que les demandeurs en cette cause aient jamais eu des droits dans l'immeuble saisi, sujets à l'enregistrement et dont ils aient renouvelé l'enregistrement de manière à primer la dite Dame Cross, attendu le défaut par elle de s'être conformée, en temps utile, aux dispositions de la loi sous ce rapport ;

" Considérant que si la créance des demandeurs est purement et simplement chirographaire, comme tout l'indique par le dossier, le premier enregistrement du testament a pu conserver les droits de la dite Dame Cross vis-à-vis des dits demandeurs, et considérant que le renouvellement de l'enregistrement du dit testament fait aujourd'hui pourrait encore conserver le premier enregistrement, vis-à-vis même tous autres créanciers hypothécaires qui n'auraient pas encore effectué tel renouvellement ;

" Considérant que pour toutes les raisons ci-dessus, l'opposition doit être déclarée bien fondée, et la contestation, tant en loi qu'en fait, qui en a été faite, renvoyée ;

" Renvoie de fait telle contestation tant en droit qu'en fait ; maintient l'opposition du dit opposant ès qualité, la déclare bonne et valable,—déclare que la dite Dame Elizabeth *alias* Eliza Cross, représentée par l'opposant ès qualité, est et était lors de la saisie pratiquée en cette cause, et dès longtemps auparavant, la seule propriétaire de l'immeuble saisie, à titre de grevée de substitution en vertu du testament du dit William Cowan, son défunt époux sus-mentionné, déclare que le défendeur n'avait alors qu'une simple espérance dans le bien saisi, et non un droit de propriété absolu dans le dit immeuble ou dans aucune de ses parties ; et déclare, en conséquence, la saisie qui a été faite de tel immeuble et tous les pro-

cédés qui ont suivi tel saisie nuls, de nul effet et non avenus et en donne mainlevée à l'opposant ès qualité. Le tout avec dépens contre les demandeurs."

From this judgment the plaintiff appealed.

Ramsay, for appellants:—

1o. Though a substitution may exist even when the word "usufruit" is used, (C.C. 928), yet substitution is not to be under any circumstances *presumed*, rather any reasonable interpretation of a doubtful instrument is to be given, which will give a *direct* and immediate legacy.

Pothier, Substitution, s. 2, art. 2.: "Comme c'est la volonté qui forme la substitution fidéi-commissaire, quoiqu'elle ne soit pas exprimée, il suffit qu'on puisse tirer des conséquences de ce qui est contenu au testament, que le testateur a eu effectivement volonté de le faire pour que la substitution soit aussi valable que si elle était exprimée. Il faut donc que ce soit des circonstances qui se tirent *nécessairement* de ce qui est contenu au testament de façon qu'on *ne puisse l'expliquer d'une manière plausible sans supposer* cette volonté dans le testateur."

Vide also 1, Prevôt de la Jannes, Jurisp. Franc. § 137.

Restrictions on the free use of property which the testator bestows upon his heirs, must be clearly expressed, and cannot be inferred, more particularly as to the creation of substitutions or entails.

Ricard, Substitutions, chap. 8, No. 393: "Quoique les fidéi-commis ne soient pas odieux, ils sont pourtant de rigueur parcequ'ils vont à charger l'héritier ou un premier fidéi-commissaire pour qui le testateur a témoigné quelque prédilection en les comprenant les premiers dans sa disposition."

2o. This Will wants all the attributes of a substitution as given by Guyot, Vo. Substitution p. 491. It is not *dispositif* of any interest in the *propriété*. *Vide* Guyot, Vo. Institution, pp. 319, 327. There is no *traite de temps*. Nothing shows that the *same* thing is to be held by Mrs. Cowan first and then delivered by her to the children. She gets revenue only. Thevenot D'Essaule, Substitutions, p. 5.

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There is no *charge de rendre.* There is no *ordre successif.* The two beneficiaries must be called successively and not jointly as here, if the words " for the benefit of" import a call. Rolland de Villargues, Substitutions Prohibées, p. 52, No. 44, &c. Thevenot D'Essaule, Substitutions, pp. 9, 69-71.

3o. Rather than substitution this is a usufruct to Mrs. Cowan *and* children as *joint* usufructuaries. " I leave all " . . . , for the benefit of my wife *and* family." Wylde's case, 6 Co. 16. Redfield, Wills, 14. *Newill & Newill*, 12 Eq. Cases 432, and 8 Ch: App. 252. Pothier, Subs.: § 2, a 1. Prévôt de la Jannes. Juris. fran. 1 § 142.

4o. Defendant, the son, is entitled by law as his father's heir to an absolute share *en propriété* and not to a mere contingency, liable to lapse as in substitution, unless his father *clearly* devised otherwise. "The heir is not to be disinherited without an *express* devise to another or necessary implication." "Such implication importing not actual necessity, but so strong a probability that an intention to the contrary cannot be supposed." Jarman, Wills. 2, 762, and see cases, Redfield, Wills 1, 425, all which concurs with Pothier, Substitutions s. 2, a. 2, and also C. C. 864.

5o. The parties by their dealings with the estate, even if it was originally a substitution, have *re-settled* it and converted it, as they had the power to do, all being born and of age, into usufruct, etc. C. C., 956, etc.

Belle, for respondent:—

1o. The nature of substitution and its characteristics.

1. Prévôt de la Jannes, jurisp. franc., § 134, 5, 7 and 142. Guyot, vo. Substitution, 453, 491. Pothier, Substitution 485, 497, 498, 499, 541.

2o. The expression *for the benefit* cannot here be construed as meaning the *usufruct* only; it is more comprehensive and includes the proprietorship as well. The testator no doubt had the intention to dispose of *all* his personal and real estate and not only of the *usufruct* thereof. In ordinary language, the word *benefit* means *use, advantage and profit.* In the judgment appealed from

the words *for the benefit of my wife and family* are translated in this way: *pour le profit, bénéfice et utilité de la dite Dame Cross et de sa famille.* And this meaning is evidently the correct one.

3o. The words: *to receive and apply such funds as may be accruing out of it*, mean evidently all the funds which may come from the Estate. It follows that the testator's wife is only bound to deliver to her children at her remarriage or death, to be equally divided between them, the *rest* of the Estate, that is, what will remain of it after maintaining and supporting herself and family and educating the children according to the intentions of the testator, and in the event of a remarriage, after deducting the sum qualified in the will under the term *dower.*

Institutes are not always bound to deliver to the substitutes the whole of the property given to them (C. C. 952); they are sometimes charged, as in the present case, to deliver only the *rest* of the property or what remains of it at the time fixed for the opening of the substitution, and this is the substitution *de ce qui reste, quod ex hæreditate superfuerit.*

5 Pothier, Substitutions, 537.—"Les substitutions uni-
" verselles ne sont pas toujours de tous les biens qu'on a
" laissés à l'héritier ou autre successeur universel qu'on
" en a grevé; on les fait quelque fois avec certaines limi-
" tations.

" Par exemple, un héritier est quelque fois grevé de
" restituer après son décès ce qui reste des biens de la
" succession, *quod ex hæreditate superfuerit.*

" Cette substitution est différente des substitutions uni-
" verselles ordinaires, en ce qu'elle ne comprend pas tous
" les biens qui ont été laissés au grevé, mais seulement
" ceux qui lui restent lors de son décès.

" Les choses, soit meubles, soit immeubles, que l'héritier
" grevé a aliénées, ne sont donc pas comprises dans cette
" substitution; il n'en est pas même dû de remplacement
" au substitué, lorsque l'héritier grevé n'a pas augmenté
" son propre patrimoine du prix de la vente de ces choses,
" mais l'a consommé pour ses besoins."

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16 Guyot, Rép. de Jurisp., vo. Substitution, 507.

4o. The acts of the parties under an *erroneous* view of their rights cannot alter those rights. It would require to be shown that they knew their rights and intended to modify them. C. C. 1214.

The Court of Appeal unanimously adopted the construction of the will given by the Superior Court, and confirmed the judgment.

R. A. Ramsay for appellant.

J. A. Belle for respondent.

(J. A. B. & R. A. R.)

May 27, 1886.

Coram DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.

THE CENTRAL VERMONT RAILROAD
(*Defendant in Court below*),
APPELLANT;

AND

HONORE LAREAU,
(*Plaintiff in the Court below*),
RESPONDENT.

Railway—Passenger jumping from Train in motion—Accident—Responsibility.

HELD:—That even where a railway company is in fault for not stopping its train at a station to which it has contracted to carry a passenger, nevertheless an action of damages will not be maintained against the company for injuries received by the passenger in jumping from a train in motion, such damages being the result solely of the passenger's imprudence.

The appeal was from a judgment of the Superior Court, Montreal, (GILL, J.), maintaining the respondent's action of damages, for injuries received by his daughter, a minor, while travelling on the appellant's road. The judgment of the Court below is reported in the M. L. R., 1 S. C. 433.

May 18.] *J. S. Hall* for the Appellant :—

The main point to decide is how far, under any circumstances, a person can jump off a train whilst in motion, and recover damages for the fall. The appellant pretends that it is a case of such gross imprudence, want of care, misconduct and negligence, that the action is completely barred. The learned judge in his judgment maintains that the conductor was bound to stop, and that the primary cause of all was his neglect to stop, but that the immediate cause was Mlle. Lareau's negligence in jumping off while the cars were in motion. This he calls *faute commune*, and mitigates the damages. To the appellant it does not seem possible to call it *faute commune*. The omission of the conductor to stop the train can hardly be compared or called equal to the foolhardy act of this young lady in attempting to jump off the train running at speed.

E. Lareau, Q.C., for respondent :—

En lisant la preuve on se persuade que l'appelante a été condamnée avec raison. Elle a commise une faute ou faite preuve de négligence ou imprudence : 1o. En n'arrêtant pas à la station comme elle était tenue de le faire. 2o. En ne faisant pas machine en arrière aussitôt que le conducteur s'est aperçu qu'il avait dépassé la gare d'Iberville sans donner à Mlle. Lareau le temps de débarquer. 3o. En n'allant pas avertir Mlle. Lareau que la station était dépassée, d'avoir à attendre pour débarquer à St. Jean, la gare voisine.

DORION, Ch. J. :—

The Court is unanimously of opinion that the judgment in this case cannot be sustained. Virginie Lareau seeing that the train was going on past the station which was her destination, and where her father was waiting for her, jumped off and was injured. It seems clear to us that it was not because the train did not stop that the accident occurred ; but because Mlle. Lareau was so imprudent as to jump off while the train was in motion. She might have recovered damages against the company for carrying her on past her destination, but that is not the case before

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us. The immediate cause of the accident was her running out of the car and jumping off. Her own imprudence was the cause of the accident, and she cannot recover for the injuries thereby sustained.

RAMSAY, J. :—

The action is for damages against a railway company for injury to the minor daughter of respondent. The girl took a ticket from St. Alexander to Iberville. Owing to some pre-occupation the conductor neglected to stop the train at Iberville. The girl, seeing she was being carried past the station, jumped out and was considerably injured. The father brought an action for the injuries sustained by his daughter, and the court awarded very heavy damages for these injuries. The whole question is as to the responsibility of the railway company. If responsible for the injuries, the amount is perhaps not excessive. It is evident that the company is liable for the damages resulting necessarily from its own act. It is not liable for the injury resulting from the act of the girl, to which she was in no way invited by the company, or its agents. The rule is quite clear, and numerous English cases turn on the distinction, which sometimes appears very fine. *In jure non remota causa sed proxima spectatur.* Respondent was quite aware of this rule, and attempted to show that there was a relaxation of speed, which the girl might have thought was an invitation to alight; but this, if a tenable reason to account for her jumping off, and thus throwing the responsibility on the appellant, is not proved. It is shown that she jumped off an arpent from the station. We are therefore to reverse.

The judgment of the court is as follows :—

" La Cour, etc.....

" Considérant que le ou vers le 11 septembre 1884, Virginie Lareau, fille mineure de l'intimé, demandeur en Cour de première instance, âgée d'environ vingt ans, aurait monté dans les chars de la compagnie appelante dans la paroisse de St-Alexandre, pour se rendre à Iberville, ayant préalablement payé le prix de son passage; que

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quoique les employés de la compagnie fussent informés de la destination de la dite Virginie Lareau, ils ne firent point arrêter le convoi à la gare d'Iberville, mais continuèrent dans la direction de la ville de St-Jean ;

" Et considérant qu'il est de plus prouvé qu'après avoir dépassé d'environ un arpent la gare d'Iberville où elle devait descendre, la dite Virginie Lareau, sans avoir requis les employés chargés de la direction du convoi d'arrêter pour qu'elle pût descendre, et sans les avoir informé de son intention de le faire, et sans aucune sollicitation de leur part, aurait descendu du char où elle était pendant que le convoi était en mouvement et procédait vers St-Jean avec la rapidité ordinaire sur cette partie de la voie, et qu'elle aurait dans sa chute reçu des blessures graves, qui l'aurait laissée pendant quelque temps sans connaissance sur la voie même ;

" Et considérant que quoique la compagnie appelante fut en faute de ne pas avoir fait arrêter le convoi à la gare d'Iberville, ainsi qu'elle y était obligée, cette omission n'est pas la cause immédiate des blessures que la dite Virginie Lareau s'est faites en descendant des chars, mais que ces blessures sont entièrement dues à l'imprudence que la dite Virginie Lareau a commise en descendant des chars pendant qu'ils étaient en mouvement, et que la compagnie appelante ne peut être tenue responsable des suites de cette imprudence et des dommages qui en sont résultés pour l'intimé ;

" Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal le 11e jour de mai 1885 ;

" Cette Cour casse et annule le dit jugement du 11 mai 1885, et renvoie l'action de l'intimé, chaque partie payant ses frais tant en Cour de première instance que sur le présent appel."

Judgment reversed.

Church, Chapleau, Hall & Nicolls, attorneys for appellant.
Lareau & Papineau, attorneys for respondent.

(J. K.)

January 27, 1886.

Coram DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.

GEORGE B. CORNER
(*Defendant in Court below*),
APPELLANT;

AND

MARIA BYRD
(*Plaintiff in Court below*),
RESPONDENT.

Master and Servant—Death of Servant—Responsibility of Employer—Damages.

M., the husband of plaintiff, was employed by the defendant, master of a steamship, to assist in unmooring the steamship then lying at the wharf at Montreal, and about to put to sea. While M. was standing ready to cast off the stern hawser from the post to which it was fastened, the hawser snapped and M. was fatally injured.

HELD (RAMSAY and CROSS, JJ., diss.):—That the presumption was that the rope was insufficient for the purpose for which it was being used, or that the ship was unskilfully handled, and in either case the master of the ship was responsible.

The appeal was from a judgment of the Superior Court, Montreal, Oct. 31, 1883 (JOHNSON, J.), maintaining the respondent's action of damages for the death of her husband. The judgment of the Court below is reported in 6 Leg. News, p. 364. The text of the judgment below is as follows:—

"The Court, etc.

"Considering that the present action is by the plaintiff, widow of the late William Macklaier, in his lifetime of Montreal, checker, against the defendant, master of the steamship *Harold*, who is alleged to have caused the death of the said William Macklaier by want of care, negligence, unskilfulness, and that the said defendant has pleaded in substance denying any want of care or skill, or any negligence on the part of himself, or of his crew and servants on the said steamship, and by alleging that the accident

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which was the cause of death was caused by the negligence and carelessness of the deceased;

"Considering that the result of the proof in the case is that the defendant met his death in consequence of the breaking of a rope fastened to the stern of the said vessel, which could not have broken as it did if it had been fit for the purpose it was used for, and had been properly and skilfully used, and that there is no proof of any neglect or carelessness on the part of the said deceased;

"Considering that the said deceased was a young man of about thirty-three years of age, and earning $14 a week as a checker, and that his widow, the plaintiff, is left without means of support, and with five children;

"Doth assess the damages in this cause at $6,000, etc."

The appeal was argued first on the 18th September, 1885, before four Judges (Dorion, C.J., Monk, Ramsay, Cross, JJ.), but the Court being equally divided, a re-hearing took place on the 18th January, 1886, before five Judges, including Mr. Justice Baby.

L. Laflamme, for appellant.

H. Abbott, for respondent.

RAMSAY, J. (*diss.*):—

The respondent sued the captain of a ship for damages for the death of her husband, who was killed by the rebound of a rope which snapped while the steamer, under appellant's command, was being cleared out of port. The deceased at the time of the accident was employed to throw the loop of the rope off the post to which the vessel was attached; and in order to do this he was standing close by, or leaning over the post.

This case raises merely a question of evidence. Questions of responsibility for accidents of this kind have been so numerous lately, that the principles on which the jurisprudence of the Court rests ought to be pretty clearly settled. It is therefore with something more than astonishment I hear it said, that it is an idea of English law that the employer is not the insurer of his *employé*. Is it pretended that it is French law that he is the insurer? It

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is universally admitted as sound law with us, that the fact of the person injured being in the employment of the defendant is not an exception to the general rule of the Code. Art. 1054 C.C. And the quotation from Sourdat in appellant's factum seems to say, that the doctrine in France accords with ours. Formerly a contrary doctrine existed in England; but the manifest absurdity of such a rule has constantly protested against it, and a recent statute has, experimentally, established a rule not unlike that which prevails here. Evidently the employer is not responsible for the ordinary dangers of the calling in which the person injured is engaged. So a ship-owner is not responsible to his sailors or their widows for the perils of the sea; but I fancy there can be no doubt of his liability if he sent out his men in a ship that was not sea-worthy.

I am not sure that anything we can say will ever sensibly decrease the difficulty of dealing with the evidence in cases of this sort; or, I might perhaps say, decrease the feeling of uncertainty by which those who are called upon to give advice as to the commencement of actions of this kind, are frequently beset. It may, however, be worth noting that a text of the Dig. de reg. jur. *l*. 23, endeavours to classify to some extent those things for which no one is presumed to be responsible. The accident occurring from any one of them, unless otherwise explained, is held to be either due to *vis major* or to be assimilated to it as *casus fortuitus*, "*id est omne quod prævideri non potest.*" 3 Meermann, 495. The action of the wind and waves has at all times been considered as being of those things which cannot be precisely calculated; and more particularly is it so when acting on a ship. Of course this presumption may be rebutted; but has it been so in this case? It is admitted that there was a fresh breeze, and that the steamer was exposed to the force of the wind and a strong current, and the hawser having become tight for an instant, snapped. It is proved that the hawser was sufficient in size and quality, therefore the fault was not in it. But it is said, if not due to any defect of the hawser, the handling of the ship must have been defect-

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ive. There is no getting off one or other horn of this dilemma, Respondent argues; and with perfect reason, if there be no such thing as a fortuitous occurrence. Of course, it cannot be denied that as an abstract question of philosophy, there is no such thing as a fortuitous occurrence, but the law has never held any one to more than reasonable care. In the homely but expressive language of our law, which I shall not translate, for fear of doing it badly, it is the *soin d'un bon père de famille*. This is not changed, and probably no one is prepared to push the pragmatical unification by the Code of *culpa*, to the extent of saying that there is no longer any occurrence for which some one is not responsible. The express terms of our Code forbid any such pretention (arts. 17 s.s. 24 C. C. and 1072, 1200, 1650). The C. N. also recognizes the *cas fortuit*. Arts. 855, 1148, 1302, 1722.

It was not my intention to enlarge upon this question; but the reference to it in another case of a similar kind to this one, makes it necessary for me to add a word or two. Under the old *régime*, it became a matter of discussion whether the doctrine of the three degrees of care which determined *culpa* was sound. Some of the feebler writers thought it was not; but the authority of the greater jurists prevailed, and the doctrine we find in Pothier was fully recognized. Mr. Sourdat has been quoted in support of the proposition that *délit* and *quasi-délit* stand on the same footing; that is, that both give rise to responsibility. This is perfectly true; but this does not imply, as has been assumed, that because *délit* includes every intentional wrongdoing which injures another, therefore every accident which entails damage, if not a *délit*, is necessarily a *quasi-délit*.(1) Were it so there would be no room for the existence of the *casus fortuitus*, which, as has been shown, would be in direct contravention of texts of positive law. As to our article, I know something about it, for I was present at its discussion. As a matter of fact, Mr. Justice Day drew the article. He was at once questioned as to its

(1) Even Sourdat does not contend for this. No. 658.

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scope, and whether he intended to unify *care*. He at once disclaimed any such intention, and I do not find in the Code any reason to think the commission departed from the intention so expressed. (1)

It is manifest that it never could be intended to say that every act of life required the same care, and that the charge of the Koh-i-nor diamond necessitated no more care than that of a glass bead. The article as it appears was, however, adopted rather from the desire to fit the Code to the waist-coat pocket, than from any wish to change the practical working of the law, or, it may be said, than from the weight of reason. (2)

From these considerations, I am constrained to say, as we did in the case of *Periam & Dompierre* (1 Leg. News 5), that without express evidence of fault on the part of the

(1) In order to have the field of discussion clearly before the mind, it is well to note carefully (a) the state of the old law; (b) the modification of the C. N.; (c) the innovation of the C. C.

The old law is thus laid down by Pothier: "*Le débiteur est obligé d'apporter un soin convenable à la conservation de la chose due. Le soin qu'il doit apporter à cette conservation est différent, selon la différente nature des contrats ou quasi-contrats d'où l'obligation descend.*" Ob. 141.

The Code Napoléon thus modifies the doctrine: *L'obligation de veiller à la conservation de la chose, soit que la convention n'ait pour objet que l'utilité de l'une des parties, soit qu'elle ait pour objet leur utilité commune, soumet celui qui en est chargé à y apporter tous les soins d'un bon père de famille.*

"*Cette obligation est plus ou moins étendue relativement à certains contrats, dont les effets, à cet égard, sont expliqués sous les titres qui les concernent.*" Art. 1137. See also 1374, 1927, 1962. See Sourdat No. 653 for an estimate of what appears "*certain, comme résultant du texte de l'art.* 1137."

The Civil Code thus lays down the law: "*L'obligation de conserver la chose oblige celui qui en est chargé d'y apporter tous les soins d'un bon père de famille.*"

This article is distinguished as new law, but it contains no proposition in violation of the old law. All that can be said is, that it might have been more ample. The doctrine of the Code therefore is, damage by fault creates an obligation in favour of the person who suffers. The lack of care which amounts to fault is left to doctrine. To say that the Code has unified care by art. 1064 would be a contradiction in principle to art. 1045.

(2) At page 18 of the First Report only a few lines are devoted to this change; but from what is said, it is plain that the commissioners did not introduce a new rule of law as to care; but only to sweep away any arbitrary rule as to "keeping a thing safely *under different classes of contracts*."

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captain, either by bad seamanship or owing to a defective rope, the snapping of the hawser of a ship, under the influence of the winds and waves, is not one of those things which renders the ship responsible.

In this case, the special evidence is all the other way. What we have on the other side is one man saying that a hawser never snapped with him while wearing a ship out of port. Another tells us that a steam-tug would diminish such risks. It does not appear that under Captain Corner's management, hawsers always break, and I don't know that there is any obligation to hire a steam-tug. Again, one of Respondent's witnesses says, that the best of hawsers may be snapped in a moment by a strain; and again we are told, that it is expected to explain everything at sea, but that everything can't be explained. We have thus the testimony of this man, Plaintiff's own witness, speaking from personal observation, confirming almost word for word the *à priori* reasoning of the jurisconsult.

If we turn to the conduct of the unfortunate deceased, it appears to me to have been most imprudent. He stood over a cable which he had as good an opportunity to see strain, as the man who paid it out, and whom the Respondent seeks to hold liable through the captain. It was when the cable began to slacken, the deceased should have gone to the post. He was of no use there when the rope was taut. It is also proved that deceased was accustomed to work on the wharf, and must have known the peril of a rope snapping in this way. Besides there is some evidence that he was warned. But even if there was no warning, and if there was no exceptional means of knowledge of the danger on the part of the deceased, it is to be presumed a man understands the ordinary risks of the work which he undertakes to perform.

Some of the modern French writers, leaving all the known rules of responsibility by way of damages, have taken an ingenious mode of extending the liability of the employer, so as to make him the insurer or *garant* against accident of his servant. The *employé*, they contend, is often,

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if not always, more or less the mandatory of his employer. The mandator is obliged to indemnify the mandatory for all his expenses or outlay, incurred without his fault. Therefore, it is said, if the *employé* breaks his leg doing his employer's work, the latter must indemnify the servant, whether the master be in fault or not, provided there be no negligence on the part of the servant. There is, however, a little doctrinal difficulty in the way of this proposition, which it is desirable to remove or poohpooh. Here is the way in which Mr. Sourdat performs the task. "*A cet égard nous repoussons avec M. Troplong (mandat* 655) *la distinction proposée par Pothier, sur le fondement d'une loi romaine entre les pertes ou dommages dont le mandat a été la cause et ceux dont il n'aurait été que l'occasion. Le texte même de l'art.* 2000 *condamne cette distinction déjà rejetée par l'ancienne jurisprudence.*" No. 913 ter.

It would be difficult to squeeze into six lines more confusion and inexactitude than is to be found in the above quotation. Under the C. N. art. 2000 the efforts of Troplong and Mr. Sourdat to *repousser la doctrine* of Pothier were quite unnecessary, for the article has laid down a rule expressly intended to overthrow Pothier's doctrine. The "*loi romaine*" on which Mr. Sourdat says Pothier bases his doctrine, happens to be, two laws of the digest which appear to be contradictory : Dig. mand. *l.* 26, 6, and Dig. pro. soc. *l.* 74, 4. These texts Pothier reconciles, by saying that the mandator must indemnify the mandatory if he suffers the loss *ex causa mandati*, and not if *hoc magis casibus imputari debet.* Mandat No. 76.

As to this distinction being *rejetée par l'ancienne jurisprudence*, we turn with a sense of relief to Troplong's exposition, which is brilliant as usual, although it leaves us in some doubt, as to whether the author is fully convinced that the new law is better than the old.

He mentions two cases, one decided at Bologna, in which it was held that the case was due to chance and not to the execution of the mandate. In the other case, it seems, the Parliament of Paris held that the mandatory

robbed while executing the mandate, had a right to indemnity from the mandator; and Troplong satirically remarks: *On voit que le parlement de Paris n'était pas aussi attaché que les docteurs de Bologne au texte de la loi* 26, *ff.* 6 D. mandati.

It seems to me that these cases may be reconciled as Pothier reconciles the texts, and therefore they do not show that Pothier's doctrine was rejected by the old jurisprudence. On this point, I terminate, copying the not very desirable method of Mr. Sourdat, by saying that our code art. 1725, has as expressly adopted Pothier's doctrine as the C.N. has rejected it. This settles for us the argument by which Mr. Sourdat attempts to render the employer the the *garant* of the employed in the same manner as the mandator is of the mandatory. But there are other difficulties, even greater, which seem to have dawned on Mr. Sourdat's imagination, but which do not require to be examined in this case.

On the question of the amount of damages, if appellant were liable, the sum accorded is enormous, and the reason given for allowing such damages untenable. The judge says he estimated the damage at $6000, because the Respondent could not support herself and her five children and clothe and educate them unless she had $360 a year. According to the judge's own appreciation of the evidence, it was only proved deceased gained $14 a week for 7 months in the year, that is about $400, and she is given the capital of $360. I must say such an estimation "shocks my sense of justice." I believe this is the point of enormity when it has been intimated a judge is justified in moderating the first assessment of damages.

I concur entirely with the learned chief Justice in his criticism as to the tendency of our days to aggravate damages. Philanthropists are never so charitable as when spending other people's money. This is probably attributable to the same false philosophy which makes the modern French law writers exaggerate the scope of fault. I would reverse.

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CROSS, J. (*diss.*):—

It is proved that there was a wind blowing at the time. The deceased was too near the post; if he had not been so near, the accident would not have happened. There was no obligation on the part of the captain to employ tugs. It seems to me a question of evidence rather than of law, and I find the evidence in favor of the ship.

DORION, Ch. J.:—

The question in this case is a very simple one. The steamship was leaving the wharf, and was fastened by a hawser to keep the stern in a proper position. The husband of the plaintiff was engaged by the captain to assist in casting off the hawser. The rope gave way while he was waiting for the proper time to cast it off, and he was fatally injured. His widow alleges negligence on the part of the ship, and brings an action of damages. The inquiry is merely this: What was the cause of this man being killed? It is certain that it was his duty to be quite close to the post. It is a matter of every day observation to see men standing with one hand on the rope, ready to cast off when the word is given. It was not because Macklaier was there that the accident occurred; it was because the rope broke. Now, why did the rope break? Was it sufficient? It is proved that it was sufficient for some purposes, but the presumption is that it broke either because it was insufficient for the purpose for which it was used, or because the ship was badly managed and the rope was not "paid" out properly. It is proved that a tug would have helped to get the ship out. The defendant answers that he was not obliged to employ a tug. But if he chooses to dispense with a tug, he must be held responsible for damages which might have been avoided by the use of a tug. It is said that there was a wind, and that it was a *cas fortuit*. But there is more or less wind every day, and the current was the ordinary current in the port. Looking at all the evidence, I am forced to come to the conclusion that the cause of the accident was either the insufficiency of the hawser or

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careless management on the part of the ship's officers in paying it out. In either case, the appellant is responsible. It was an accident, no doubt; it was not wilful; but it was one of those accidents for which the appellant is liable because it could have been prevented by care on his part.

On the question of damages, we think the judgment went too far. The deceased is shown to have been earning $14 a week during the summer season. This would be about $400 per annum. The Court below awarded $6,000 damages. This would leave the family better off than if the husband had lived. The Court here is of opinion that $2,500 is a sufficient sum. The judgment will be reformed accordingly, with the costs of the appeal in favor of the appellant.

MONK, J.:—

I concur in the opinion of the learned Chief Justice. As I read the evidence, it was not a case of *force majeure*; the deceased was not in fault; and although the ship was not obliged to employ a tug, yet in order to exonerate the captain from responsibility he should have employed a tug. I would have given a larger amount than $2,500, but I concur in the judgment.

Judgment reformed as to amount of damages.

Laflamme, Huntington, Laflamme & Richard, attorneys for appellant.

Abbott, Tait & Abbotts, attorneys for respondent.

(J. K.)

March 22, 1886.

Coram DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.

BRADY

(*Plaintiff below*),

APPELLANT;

AND

STEWART ET AL.

(*Defendants below*),

RESPONDENTS.

Litigious Right—Sale of—C. C. 1582–1584.

HELD:—That C. C. 1584. § 4, which states that "the provisions of C. C. "1582 do not apply when the judgment of a court has been rendered "affirming the right," refers to a judgment upon the particular demand in litigation, and not to a judgment affirming another right of a similar character.

The appeal was from a judgment of the Superior Court, MATHIEU, J., maintaining a plea of litigious rights.

The appellant became the owner of forty shares in the St. Gabriel Mutual Building Society, under transfers from four persons, who each transferred ten shares to him. By the present suit he asked that the respondents, the liquidators of the society, be ordered to recognize him as the holder of these shares, and to place his name upon the dividend sheets prepared for the division of the proceeds of the assets among the members.

The principal defence to the action was to the effect that at the time the shares were transferred to the plaintiff, the transferors had no rights as members; that their shares had been confiscated and forfeited for non-payment of dues, and that the plaintiff had purchased, for a small consideration, rights which he knew to be disputed; that he was the buyer of litigious rights, and under Article 1582 of the Code, could only recover the price paid, with interest thereon.

The Court below maintained this defence, and judg-

ment was rendered merely for the amount paid by the plaintiff, and interest.

Jan. 15.] *C. J. Doherty*, for appellant.
J. J. Curran, Q.C., for respondents.

RAMSAY, J. (*diss.*) :—

This is a case turning on the question of what is a litigious right. Article 1582, of the Code Civil, says that the sale of litigious rights may be met and the debtor discharged by his paying the purchaser what he paid for it, his costs and interest. Clearly every right is not meant, and Art. 1583 C. C. attempts to give a definition : "A right is held to be litigious when it is uncertain, and disputed or disputable by the debtor, whether an action for its recovery is actually pending or is likely to become necessary." If the article had said a litigious right is a litigious right, it would have been almost equally effective. Practically speaking, a right can never be uncertain to the judge, and our Code, therefore, forbids him to refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law (11 C. C.). No text of law expressing directly the doctrine of this article can be found, so far as I know, either in the Roman law or in the ancient law of France ; but its dispositions accord with, and are almost a necessary consequence of the rule laid down for the interpretation of the laws. If a law might remain doubtful to the judge, why should he be enjoined to interpret what seems doubtful or ambiguous in the text? Art. 12 C. C.

But it is equally clear that, philosophically speaking, every debt is disputable. Cicero says : *Omnis res habet naturam ambigendi.* The only definite description of a litigious right is one that is actually disputed. But that idea is excluded expressly by the last words of our article. Under the C. N. (Art. 1700), the question turns entirely on the institution of the action, and now a litigious right in France, is neither more nor less than one which is the subject of litigation *sur le fond de droit.* We, therefore, can get little help from the French books on

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the point before us. The doctrine of the old authors offers no solution, and the matter seems to have been left rather to the disciplinary authority of the Courts than to any positive rule of law. This appears to me to be a mode of treating the matter which is no longer available, since all legislative power has been taken away from the Courts. I do not mean to say that Courts have now no discretionary powers. The distinction I desire to express, is that they have no indefinable discretion to set aside contracts. An illustration will render my meaning plain. The judge may set aside a contract for fraud; but the fraud must be subject to circumscription. So a judge may set aside the conveyance of a litigious right, but only where a logical definition can be given of what is meant by the term. I have not yet heard any attempt to perform this feat in the present case. It is, of course, our duty to give effect to the legislative will, expressed in article 1583, so far as it is possible. In doing this, I cannot apply the article to questions other than those where there is doubt as to the facts—for instance, cases depending on the death of an heir or a legatee.

Taking this view, I am to reverse—the facts never were doubtful in this case.

MONK, J., concurred in the dissent, considering that there was no room left for doubt as to the validity of the right, and that it could not be regarded as a litigious right.

CROSS, J.:—

The appellant, as holder under transfers of forty shares in the St. Gabriel Mutual Building Society, which is in liquidation, sues the liquidators, claiming a mandamus to compel them to acknowledge him as a shareholder in the society and to collocate him for dividends on his forty shares, for the past as well as for the future, on equal terms with other *bonâ fide* members of that society.

The only defence that requires notice is the question raised by the respondents' second plea, viz., that appel-

lant's claim was for litigious rights; that the shares he pretended to claim had been to his knowledge, with others in like position, declared forfeited by resolutions of the society for non-observance of its regulations,—and with a full knowledge of this fact, for a long time acquiesced in by all concerned, the appellant had purchased the shares he represents at a nominal price, far below the value of legitimate shares, with the expectation of being able to establish the right by legal process; that a judgment had since been rendered in a suit brought by an original shareholder in the same category, as regards forfeiture, as the shares claimed on by the appellant,—and it had been in that suit determined that such shares had not been legally forfeited for want of the observance of the legal formalities necessary to establish such forfeiture. The society had consequently passed a resolution restoring to or admitting the rights of all original shareholders whose shares in like category had been declared forfeited; but with regard to such as had been transferred, including, of course, those claimed by the appellant, as they had been disputed, and acquired by the appellant for a nominal price, with a view to their being established by litigation, the respondents were only bound to reimburse the appellant for their cost, with expenses and interest, which they were ready to pay or deposit so soon as the amount, (of which they were ignorant,) could be ascertained.

The appellant replied, denying that the rights were litigious, and maintaining that if at any time they could have been considered such, they had ceased to be so in virtue of the judgment of the Superior Court, confirmed in Appeal, in the case of the Rev. Mr. Charbonneau, whose shares had been declared forfeited in like circumstances as those of the appellant.

The Judge of the Superior Court held that the rights thus sought to be enforced by the appellant were litigious; that he was entitled to no more than what would indemnify him for their cost, with expenses and interest added, for estimating which, data were given in the judg-

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ment, the amount whereof the respondents were to pay to the appellant within eight days, or, if refused, to deposit it in Court. In obedience to which order respondents deposited $200 and asked for final judgment, and the Court, finding the deposit sufficient, dismissed the action by judgment rendered 10th April, 1885. I quote from the evidence on which this judgment of the Superior Court is based.

The appellant himself, examined as to the purchase of his shares, says:—"I bought them at very reduced prices. "I paid Alex. Coultry $40.50 for his shares; I paid Sam. "McKee $51.25 for his shares; I paid to Wm. Huddlesley "$19.25, and I paid to Geo. Dalrymple $15 for his shares, "with the understanding that if I succeeded in getting "the whole amount paid on his shares I would give him a "further amount of $15." Thus he only paid $126 for shares which, according to his claim, would give him $727.75 for dividends already declared, as well as establish his rights to the future dividends.

McKee says:—"I understood that a lawsuit would "have to be instituted before we could get the amount, "and I sold Brady the books at his own risk;" and Wm. Huddlesley being asked whether he sold a lawsuit, answered, "I understood it that way, certainly."

The appellant, without conceding that the rights in question were at any time *droits litigieux*, insists, with great plausibility, on the argument that if even at one time they were such, they ceased to be so when the Rev. Mr. Charbonneau succeeded in obtaining a judgment maintaining the non-forfeiture of his shares, which were in the same position in this respect as were the shares of the *auteurs* of the appellant before their transfer to him; and he considers himself sustained in this view of the case by the terms of § 4 of Art. 1584 C. C., which explains that the provisions contained in Art. 1562, discharging the debtor by payment of the price and incidental expenses of a litigious right, do not apply when the judgment of a court has been rendered, affirming the right. I do not think the appellant in this fairly applies the meaning of this proviso. It is true that the principle

affecting another right of a similar character which never had become litigious had been determined, but not the particular right or claim now sought to be enforced, which had become and was litigious before the other claim or right was passed upon, and which, in fact, may remain litigious, as the other judgment has not been acquiesced in by third parties, and might not be, should a case arise that could be taken to a higher court. My interpretation of this provision of the Code is that it only applies to the particular demand in litigation having been confirmed by the judgment of a court. Were it otherwise, it would be easy for a speculator to press to judgment a case in which a similar principle was involved to one affecting numerous claims which he had purchased at a nominal price, and thus to evade in great part the law applicable to the purchase of litigious rights.

As to the litigious nature of the rights in question, I think the terms of Art. 1582 C. C., and Pothier, Vente, No. 583, fairly demonstrate that they are litigious. Pothier says: "Celles qui sont contestées ou peuvent l'être en total " ou en partie." The society had apparently in good faith adopted proceedings which, according to their judgment, should have proved effective to forfeit the rights for well established defaults; the shareholders had been notified, and for a long time seemed to make no objections; the claims so unpromising had been purchased as a speculation by the appellant, he knowing that they were disputed and would require litigation before he could hope to recover anything on them. We have held such rights to be litigious where the principle seemed even more difficult of application, viz., I think, in the case of *Dansereau & Letourneux.*(1) The majority of the Court are of opinion to confirm the judgment in this case.

Judgment confirmed,
Monk & Ramsay, JJ., *diss.*

Doherty & Doherty, attorneys for appellant.
Curran & Grenier, attorneys for respondents.
(J. K.)

(1) M. L. R., 1 Q. B. 357. See opinion of Cross, J., p. 362.

September 25, 1886.

Coram DORION, C. J., RAMSAY, TESSIER and CROSS, JJ.

JAMES P. COX,

(*Plaintiff in Court below*),

APPELLANT;

AND

WILLIAM R. TURNER ET AL.,

(*Defendants in Court below*),

RESPONDENTS.

Sale—Delivery—Refusal to accept—Counsel fee.

The appellant, at Montreal, on the 26th September, 1884, sold tea to arrive ex "Glenorchy," at the port of New York. The tea reached Montreal October 14, 1884, and was then offered to respondents. The latter refused to accept unless the conditions of sale were altered, and the tea was resold at a loss.

HELD:—That the offer of October 14 was an offer to deliver within a reasonable time, and that if the respondents, after refusing to take delivery according to the conditions of sale, wished to retract their refusal, it was incumbent on them to make a distinct offer to the appellant to do so, and not to leave him in doubt as to the position they took in the matter.

2. A fee paid to counsel for advice will not be allowed as part of the damages for breach of contract.

The appeal was from a judgment of the Superior Court, Montreal (DOHERTY, J.), May 5, 1885, dismissing the appellant's action. The written judgment of the Court below was as follows:—

"The Court, etc.

"Considering that the plaintiff hath failed to prove the material allegations of his declaration, and more particularly that he ever put the defendants *en demeure* to accept and pay for the tea in question in this cause, under and according to the conditions of the broker's sale thereof to the defendants;

"And considering that whilst holding defendants strictly to the conditions of said sale in so far as they were bound originally thereby and persisting therein, he

was and still is in default to deliver, or to offer to deliver, said tea according to and upon the conditions of said sale, or upon any conditions which defendants were bound to accept, and that they were not bound to pay before or simultaneously with said delivery as insisted by the plaintiff, contrary to the conditions of said sale which by this action he now seeks to enforce;

"And considering that defendants have proved the material allegations of their plea and *défense* to this action, and more particularly that the breach of said contract was made by plaintiff and not by them, to wit, by refusing examination and delivery of said tea according to said sale and the usage of the trade in that behalf;

"Doth maintain the said pleas and defence of defendants and doth dismiss the plaintiff's action with costs."

September 20.] *N. W. Trenholme* for appellant:—

The case arises upon a sale of sixty-eight half chests tea. The appellant found that the respondents would not accept the tea in accordance with the contract. He, therefore, caused the tea to be resold, and a loss of $133.22 was incurred, and it was to recover this amount that the suit was brought. Mr. Justice Doherty, in the Court below, held that the appellant had not offered the tea upon conditions that the respondents were bound to accept, and the action was dismissed. The appellant contends that the respondents had ample time to test and weigh the tea. They got a delivery order on the 11th October, 1884, with the invoice. On the 13th and 14th October, the whole of the tea was placed in the store of D. Kiniry, warehouseman. On the 15th, they declared that they would not accept the tea, unless the sale for prompt cash were changed so as to make it a sale at four months. On the 17th, one of the respondents complained that Kiniry had refused to deliver them a half-chest for examination. The appellant was absent at this time, but the next morning the respondents received an order to examine the tea, and the pretext that they could not get it in time to fill orders was unfounded.

J. O. Joseph and Hon. *R. Laflamme*, Q.C., for respondents:

When the respondents promised to buy tea on Septem-

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ber 26, the broker acting for appellant represented that it was on the way from New York, which implied that it would be delivered in Montreal about October 1; and depending on such representations they made several sales which they were obliged to cancel. The tea having arrived some fifteen days later than was expected, they were entitled to refuse it, but would have taken it if it had been equal to sample, but they were refused permission to examine a sample. They had drawn a cheque on the 17th October, but, disgusted with the treatment they had received, they finally preferred submitting to the inconvenience of not getting the tea, and decided to have nothing more to do with the appellant.

CROSS, J., (for the whole Court):—

On the 26th September, 1884, the appellant, through his broker, Osgood, sold the respondents sixty-eight half-chests Japan teas, as per sample, Giraffe, 118,120, at 20 cents per lb., duty paid, to arrive ex-Glenorchy, that is by a vessel of that name, to arrive, or which had arrived, at the port of New York; terms prompt cash, less 3 per cent. The tea had all arrived at Montreal by the 14th October, and had been placed in the warehouse of David Kiniry, warehouseman. Previously, that is on Saturday, the 11th of October, the appellant caused an invoice and delivery order (the latter addressed to Kiniry) to be made out and delivered to the respondents. This delivery order was by respondent's carter presented to Kiniry, probably on the 14th or early on the 15th of October (the exact time is not fixed by the proof), and Kiniry, in answer, offered to deliver the tea, but it was not then accepted, and the delivery order was left with Kiniry. In the meantime, by a letter dated the 14th, but only delivered on the 15th October, the respondents refused to accept the tea, unless the appellant would change the conditions of sale, so as to make it on credit in place of for cash. This letter was to the effect that they, the respondents, would only accept the tea on condition that they should have the option of four months or 3 per cent., meaning 3 per cent. discount at thirty days. The pretext for making

this demand was that the tea had not arrived in reasonable time, an excuse which does not seem to be borne out by the proof, nor was it persisted in.

The appellant refused to accede to this proposed change of terms, more especially to put himself in the position of a vendor on credit. The respondents, nevertheless, without intimating that they abandoned the position taken by them in their letter above cited, caused a demand to be made by their carter on Kiniry for the return of the delivery order which Kiniry then, by the instructions of the appellant, as well verbally as in writing, refused to give him. The appellant's written instructions to Kiniry, contained in a letter dated October 15, requested Kiniry to retain the delivery order in his possession, and stated also that as the respondents had written the appellant, declining acceptance of the tea unless the appellant would change the terms agreed upon, Kiniry was requested not to deliver the tea, pending instructions from him, the appellant, whereupon the respondents, through their attorneys, Doutre & Co., by letter of date October 18, addressed to the appellant, stated that the tea was not delivered by Kiniry when appellant's order was presented; that on that refusal they had been requested by their clients to ask the delivery of the tea or the remittance of the order, which had been handed to Mr. Kiniry; that as Kiniry alleged he could not deliver the tea nor the order, because of instructions received from the appellant, their clients the respondents considered that the contract with the appellant was cancelled, and they intended holding the appellant responsible for all damages.

Up to this time, the only question in dispute was as to the delivery of the tea, which appellant had the right of withholding against the demand that the transaction should be one on credit. If the respondents had coupled their demand for the order with a declaration of willingness on their part to comply with the terms of the sale, they might have thereby restored their position and put the appellant on his diligence. The appellant, consistent

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with his pretensions, took this further precaution: as the respondents were entitled to inspect the tea, appellant, on the 18th October, sent them an order addressed to Kiniry to allow them to sample the tea.

The next proceeding was a formal notarial protest by the appellant, made and signified to the respondents on the 21st October, whereby he narrated the facts above recited and tendered the respondents a delivery order for the tea, demanding payment thereof according to the terms of the agreement for the sale thereof, and there being no compliance with this demand, but a refusal, on the grounds already taken by them, the appellant caused the tea to be sold for the best price that could be obtained for it, through a broker, who offered it to the respondents themselves. There was a loss on the tea, which realized less than the price the respondents had agreed to pay for it, for which loss, with certain costs alleged to have been necessarily incurred by appellant, the present action has been brought.

The learned judge of the Superior Court was of opinion that the appellant had been in default to deliver the tea according to the terms of the sale, and that the appellant had required payment before or simultaneously with the delivery of the tea, which the respondents were not bound to make; he consequently dismissed the appellant's action.

The court here think that the learned judge was in error in this view of the case; that the appellant was ready and offered to deliver the tea, and that the breach of the contract occurred by the respondents refusing to accept it unless the conditions of sale were changed so as to convert a sale for cash into a sale on credit; that on such refusal, the appellant was justified in stopping the delivery of the tea, until satisfied that he would be paid according to the terms of his contract and should not be obliged to submit to terms of credit; that in the absence of stipulation to the contrary, the condition precedent on the vendee's part is readiness to pay the price; that the offer to deliver was afterwards renewed in the protest

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served upon the respondents, and that the pretended damages suffered by the respondents in consequence of delay in delivery, are not imputable to the appellant. There is no doubt the respondents suffered inconvenience, and, perhaps, even loss, in their business by not having the tea sooner, but on a sale to arrive from a vessel expected in New York, the delay was not excessive, and until the arrival of the tea, no steps were taken to complain of the delay, nor is there much in the pretension that prompt cash meant payment several days after delivery. On a cash sale, vendor's lien holds, and there can be no complete delivery until the money is ready simultaneously.

This court is of opinion that the judgment of the Superior Court is to be reversed, and the appellant is to have judgment for the loss upon the resale of the tea, together with the costs of protest. A demand of quite a novel character is, however, set up in this case, viz., the allowance of a counsel fee for giving advice to the appellant. We are not disposed to allow this charge. The courts are continually pressed to allow extraneous charges, and if such demands were not resisted, the costs of litigation would rapidly become even more ruinous than they already have the reputation of being. Every subject is supposed to be bound to know the law for himself, and if he thinks it prudent to be advised on what is legally an obligation of his own, he indulges in a luxury he is legally and, I presume, fairly bound to put to his own charge.

The judgment is as follows :—

" Considering that at Montreal, on the 26th of September, 1884, the appellants, through the instrumentality of one Osgoode, a broker, sold to the respondents 68 half chests of Japan tea at 20 c. per lb., duty paid, to arrive *ex* " Glenorchy," (that is by the vessel called the Glenorchy, at the Port of New York), terms prompt cash, less three per cent ;

" Considering that said tea arrived at Montreal before and on the 14th of October, 1884, and was then and there offered to the respondents, and payment thereof duly

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demanded of them, according to the conditions of such sale ;

" Considering that by letter dated the 14th of October, 1884, written by the respondents and by them addressed to the appellant, and delivered to him on the 15th of October, 1884, they, the respondents, refused to accept the said tea, unless the appellant would consent to change the conditions of the said sale, so as to make it a sale on terms of credit, in place of a sale for prompt cash ;

" Considering that the consequence of the said refusal was to cause loss and damage to the appellant, which have been ascertained and determined by the resale of said tea and consequent expenses at the sum of $113.22, for which the respondents are bound to indemnify the appellant ;

" Considering that if the respondents were afterwards willing to retract their said refusal and to conform to the conditions of said sale, it was incumbent on them to have made a distinct offer to do so to the appellant, and not to have left him in doubt as to the position they took in the matter ;

" Considering that after said refusal, the appellant was justified in refusing the delivery of said tea, until the respondents should have made offer in a distinct manner to carry out the terms of said sale and fulfil their obligations thereunder, which they failed to do ;

" Considering therefore, that there is error in the judgment rendered by the Superior Court in this cause on the 5th of May, 1885, the Court of Our Lady the Queen, now here, doth reverse, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth adjudge and condemn the respondents jointly and severally to pay and satisfy to the appellant the sum of $113.22, &c."

Judgment reversed.

Trenholme, Taylor, Dickson & Buchan, attorneys for appellant.

Joseph & Dandurand, attorneys for respondents.

(J. K.)

December 30, 1885.

Coram DORION, C. J., RAMSAY, CROSS, BABY, JJ.

CHARLES NORTHWOOD ET AL.
(*Plaintiffs below*),
APPELLANTS;

AND

ALEXANDER BORROWMAN
(*Defendant below*),
RESPONDENT.

Sale—Delay in delivery—Diligence.

The appellants, of Chatham, Ont., through brokers at Montreal, on the 6th July, sold a cargo of wheat, to be shipped by sail, as soon as a vessel could be secured, and to be delivered at Montreal.

The wheat did not arrive at Montreal until August 15th, when the respondent refused to accept it. The appellants had endeavoured to obtain a vessel at Detroit, but it was not until July 21st, that a vessel was finally chartered at Toronto.

HELD:—That the delay of fifteen days which elapsed before a vessel was chartered, was an unreasonable delay, as it appeared that a vessel might have been obtained sooner at Toronto, if the appellants had been willing to pay a liberal rate of freight; and the appellants not having shown due diligence, the respondent was justified in refusing to accept the wheat.

The appeal was from a judgment of the Superior Court, Montreal (JETTÉ, J.), Oct. 31, 1883, dismissing the action of the appellants.

The judgment of the Court below (which was affirmed by the judgment now reported), was in the following terms:—

"La Cour, etc.

"Attendu que les demandeurs réclament du défendeur la somme de $1203.05, étant la perte par eux subie sur la revente d'une cargaison de 8,919 minots de blé vendue au défendeur, en juillet, 1882, à raison de $1.36 le minot, mais dont le défendeur a ensuite refusé de prendre livraison et que les demandeurs ont fait revendre à ses risques,

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ne réalisant que $1.22½ par minot, et occasionnant en conséquence la perte totale susdite, maintenant réclamée;

" Attendu que les demandeurs allèguent spécialement que par le contrat entre les parties, passé le six juillet, 1882, il était stipulé que le grain vendu devait être expédié par voilier, de Chatham, dans la Province d'Ontario, à Montréal, et ce aussitôt qu'un vaisseau pourrait être affrété, que lors de ce contrat le demandeur connaissait le port de Chatham et savait qu'il y allait peu de voiliers, surtout de la capacité requise en cette circonstance; que les demandeurs ont expédié ce grain avec toute la diligence voulue, et que le quinze août ils l'ont offert au défendeur qui l'a refusé sans raison plausible;

" Attendu que le défendeur a contesté cette demande disant: que d'après le contrat invoqué et suivant la coutume du port de Montréal, en tels cas les demandeurs devaient charger et expédier la marchandise vendue sous un délai de cinq jours; qu'ils auraient pu se procurer un navire dans ce délai et que le grain serait alors arrivé a Montréal vers le vingt juillet, mais que par la faute et la négligence des demandeurs il n'est arrivé que le quinze août, et qu'après un retard si considérable le défendeur était bien fondé à refuser de prendre livraison de la dite marchandise;

" Attendu qu'il ressort de la preuve au dossier que les demandeurs paraissent avoir fait de promptes démarches, pour se procurer un navire, aussitôt que contrat fut passé ils n'ont cependant conclu que le vingt-un juillet avec les propriétaires de "*l'Ariadne*," et que le chargement de la marchandise ne s'est fait que le premier août;

" Attendu qu'il est de plus prouvé, même par les témoins des demandeurs qu'il aurait été possible à ces derniers de se procurer un navire plus promptement en payant un fret plus élevé, et qu'il résulte de la preuve de la défense qu'il était même facile, vu la quantité de navires cherchant emploi à cette époque, de s'en assurer un de la capacité voulue, du six au quinze juillet, et par suite d'expédier la marchandise dans un délai beaucoup moins long;

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" Attendu qu'il est de plus établi par nombre d'affréteurs et d'expéditeurs de grains même de ceux examinés au soutien de la demande, que le retard des demandeurs, dans la circonstance, est tout-à-fait hors des usages du commerce ;

" Considérant que bien que par les termes du contrat entre les parties il n'ait été fixé aucun délai certain et déterminé pour l'expédition de la marchandise vendue, les mots y insérés : aussitôt qu'il sera possible de se procurer un navire, (*as soon as vessel can be secured,*) doivent néanmoins s'entendre et s'interpréter comme n'accordant aux vendeurs qu'un délai raisonnable, d'après les usages du commerce, en pareil cas, et que ces usages condamnent le retard des demandeurs dans l'espèce et justifient au contraire le refus du défendeur, d'accepter la livraison tardive de la dite marchandise ;

" Maintient les exceptions et défense du défendeur, déclare l'offre fait par les demandeurs de la marchandise vendue, le quinze août, 1882, insuffisante et tardive aux termes du contrat invoqué et en conséquence renvoie et déboute l'action des demandeurs avec dépens distraits, etc."

Nov. 17. *L. N. Benjamin*, for appellants.

C. B. Carter, for respondent.

CROSS, J. :—

On the 6th of July 1882, Messrs. Northwood & Stringer, of Chatham in Ontario, through their brokers at Montreal, A. D. Thomson & Co., sold to Messrs. Borrowman & Co., a cargo of Red Winter Wheat, from eight to ten thousand bushels, like previous samples, at $1.36 per bushel of 60 lbs, delivered here at Montreal, wheat to be shipped by sail as soon as vessel can be secured.

The cargo consisting of about 9,000 bushels, arrived at the Port of Montreal from Kingston, in the Barge " Kinghorn," on the 15th August, Borrowman & Co. being notified.

It was formally tendered to Borrowman & Co. on the 17th August by notarial tender and protest, which was

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repeated on the 19th, but was refused by Borrowman & Co. Northwood & Co. thereupon sold it at a loss, and brought their action for the damages sustained, on the ground that the tender was too late.

It was shipped from Chatham, on the 1st August for Kingston, by the Schooner "*Ariadne*," which had been chartered at Toronto, on the 21st July. It does not appear that any extraordinary delay occurred in expediting the cargo after the charter of the "*Ariadne*." Chatham is an inland port on the River Thames. As a vessel was only procured at Toronto, it had to pass thence through the Welland Canal, through Lakes Erie and St. Clair, and up the Thames River to Chatham, which would probably occupy about five days, but could have been accomplished in a shorter time if the vessel had been towed. The downward passage to Kingston seems not to have occupied an unreasonable time, and from Kingston to Montreal, it was performed in about the usual time. Supposing the voyage to have been possible in a day or two less, it cannot be said to have been materially out of time. As to the time occupied in securing a vessel, fifteen days, the delay is more questionable. The contract is one in which time is of its essence, in which if the subject of the contract is not forthcoming at the time promised, the purchaser can repudiate. The appellant has himself put the case with extreme fairness in submitting the question as one purely of diligence respecting the delivery; that is, whether the arrival of the wheat was in reasonable time within the terms of the contract. Respondent has contended and brought witnesses to prove that by a custom of trade at Montreal, five days are allowed for the seller to engage a vessel when the contract is for prompt delivery. Appellant contends that no such custom could be applicable to an inland port like Chatham, and that the contract was not for prompt delivery. The custom, if fully established, cannot be said to be unreasonable. The sale being made at Montreal, where such custom is alleged to prevail, it may be presumed that the seller took upon himself the risk of

Chatham being a Port where the difficulty of obtaining a vessel was more than usual. Although the contract is not for delivery on a particular day, nor in terms for prompt delivery, yet its meaning was equivalent to an agreement for prompt delivery. A good deal of diligence is shewn on the part of the seller; he put the matter in the hands of a Shipping Broker, at Detroit, the usual direction such inquiries take. This agent, Mr. Jones, swears to diligence on his part; it is noticeable that he does not produce the answers to any of the applications he made. It is not until the 15th of July, that the sellers themselves seriously undertake the affair. This is shewn by their telegrams, and although Toronto is a little out the way from a port such as Chatham, it may be said a good deal out of the way, yet it is a principal port in Ontario for engaging vessels, and should have been resorted to so soon as difficulty was experienced in getting a vessel at Detroit. The application to Toronto resulted in the engagement with reasonable promptitude of the Schooner "Ariadne," to carry the wheat to Kingston, and it is satisfactorily proved by the appellant that sailing vessels were easily procurable at Toronto between the 6th and 21st of July, 1882, at a fair rate of freight. There is reason to infer from the proof that the sellers could have got a vessel by being a little liberal as to the rate of freight. It would not have been fair to have required them to pay an unreasonable rate, but they might, at all events, have offered a liberal rate. It is true they telegraphed to their brokers at Montreal, on the 15th July, to enquire if a Propeller would do. It is not shown whether at that time the question was distinctly put to the buyers whether they would accept from a Propeller, but it seems certain that when the sale note was passed, the buyers insisted on a sailing vessel. They may have had good reasons for it, and at all events they have a right to insist on their contract. The question comes finally to be, whether an unreasonable delay occurred in procuring a vessel to carry the wheat. In the appreciation of the Judge of the Superior

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Court, the delay was unreasonable; we think that the weight of evidence at least tends that way, and we feel that we cannot reasonably reverse the finding of the learned judge on that evidence. The judgment will therefore be confirmed. It has the semblance of being a hardship to the appellants, but on the other hand, it is remarked that this kind of commerce could not be carried on, unless the conditions of such bargains could be enforced with some degree of strictness.

DORION, CH. J.:—

There is no doubt from the evidence that a vessel could have been obtained at Toronto at an earlier date, but the appellants were not willing to give the rate asked. The Court holds the appellants liable for not using due diligence. It may seem to be a rigorous interpretation of the contract, but this was a mercantile case, and these contracts are to be strictly interpreted.

Judgment confirmed.

L. N. Benjamin, attorney for appellants.

Kerr, Carter & Goldstein, attorneys for respondent.

(J. K.)

December 30, 1885.

Coram DORION, C. J., RAMSAY, CROSS, BABY, JJ.

FRANCIS E. GILMAN,
(*Petitioner below*),
APPELLANT;

AND

ARCHIBALD CAMPBELL ET AL.,
(*Respondents below*),
RESPONDENTS.

Action—Damages—Unauthorized sale of shares—Demurrer.

HELD:—That an action of damages setting forth, in effect, that a bank, to which plaintiff had transferred certain shares as collateral security for an advance, had, without right, and against the will of plaintiff, sold the said shares at a third of their value, on purpose to injure plaintiff, is not demurrable because the plaintiff has not offered defendant the alternative to substitute other shares.

The appeal was from a judgment of the Superior Court maintaining the second answer in law filed by respondents and dismissing the petition of appellant *sauf recours* with costs. (Montreal, JETTÉ, J., Feb. 28, 1885.)

The judgment appealed from is as follows:—

"La Cour, après avoir entendu les parties par leurs avocats respectifs, sur le bien fondé des deux défenses en droit produites par les intimés à l'encontre de la requête du dit requérant Gilman, et délibéré;

"Attendu que par la dite requête Gilman énonce qu'en décembre 1883 il a transporté d'abord à Goodhue, en garantie d'un prêt de $25,000, puis à la Banque d'Echange en garantie d'autres transactions financières, trois milles actions de cent piastres chacune, qu'il possédait dans le fonds capital de la Compagnie d'Assurance la Royale Canadienne; qu'en juillet 1884, les intimés, liquidateurs de la dite Banque d'Echange, ont, contre son gré et malgré ses protestations, illégalement vendu ses dites actions, au prix de dix piastres chacune, tandis qu'elles valaient trente

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piastres: que cette vente a été ainsi faite dans le but de nuire au requérant et que les intimés sont par suite responsables de la valeur des dites actions s'élevant à $90,000, et que le dit requérant conclut en conséquence à ce que les intimés soient condamnés à lui payer cette somme de $90,000.

"Considérant que les intimés demandent le renvoi de cette requête comme mal fondée en droit, disant;

"Par une première défense en droit: 1st. Que le requérant ne pouvait se pourvoir que par action: (2) et non par requête (3) présentée en chambre (4) sans autorisation préalable (5) et demandant des dommages résultant de l'inexécution d'un contrat;

"Et par une seconde réponse en droit (1) que le requérant n'allègue pas avoir demandé ses actions aux intimés. (2) Qu'il ne pourrait d'ailleurs le faire sans payer sa dette à la banque (3) ce qu'il n'allègue pas (4) faisant voir au contraire qu'il n'a pas payé les $25,000 dues à Goodhue. et réclamant néanmoins la somme totale de $90,000. (6) Enfin qu'il ne donne pas aux intimés l'alternative de livrer les actions de la dite compagnie d'assurance Royale Canadienne.

"Adjugeant d'abord sur la première défense en droit des intimés;

"Considérant que le requérant s'est régulièrement pourvu par requête. Que le juge en chambre exerce les pouvoirs de la Cour pour les fins de la liquidation des banques et qu'aucune autorisation préalable n'est requise pour procéder par voie de requête au Juge ou à la Cour. Vu les articles 43, 77 et 20 du statut 45 Vict., ch. 23;

"Renvoie en conséquence la dite première réponse en droit des intimés avec dépens distraits à Maître Oughtred, avocat du requérant;

"Et adjugeant maintenant sur la seconde défense en droit;

"Considérant qu'il résulte des allégations de la requête que tout ce que le requérant peut demander aux intimés ce sont ses actions dans le fonds capital de la dite Compagnie d'Assurance Royale Canadienne et non une con-

damnation directe et principale en argent sans alternative quant aux dites actions, et que par suite ses conclusions ne sont pas justifiées ;

" Maintient la dite deuxième défense en droit des intimés, et en conséquence renvoie la requête du requérant sauf recours, avec dépens à Maîtres Greenshields, McCorkill et Guerin, avocats des intimés."

Nov. 16.] *A. R. Oughtred* for appellant :—

It is from that part of the judgment maintaining the second of respondent's answers in law that this appeal is taken.

The claim of petitioner, appellant, is for damages, and is taken under the provisions of the Act for the liquidation of Insolvent Corporations, 45 Vict., chap. 23.

Appellant alleges in his petition that he pledged 3,000 shares of stock in the Royal Canadian Insurance Company, of which he was the proprietor, to one George O. Goodhue as collateral security for the payment of a loan of $25,000.00 and interest, the contract bearing date December 10th, 1883.

That on the 14th of the same month, the same 3,000 shares of stock were again pledged by appellant to the Exchange Bank of Canada, then in liquidation, giving to the bank the right to pay Goodhue and get the stock and hold it in pledge for any amount found to be due the bank by appellant.

That the respondents paid Goodhue the amount due him by appellant and got possession of the said stock and subsequently, illegally and fraudulently sold the same at public auction, and transferred and delivered it to the purchaser, and that at the time of the institution of the present petition it was out of the power and possession of respondents.

That the sale in question was an unlawful disposition by respondents of appellant's property, contrary to the terms of the contract of pledge ; and that the whole of the proceedings of respondents were fraudulent and for the purpose of injuring petitioner, under color of law, and resulted in depriving appellant of his property of

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the value of ninety thousand dollars ($90,000.00). And in conclusion, petitioner asks damages to the full value of the stock, that is $90,000.00,

To this petition respondents file two demurrers.

The first questions the legality of appellant's procedure.

The second raises a number of objections which when summarized resolve themselves into two: 1st. That no tender of the amount of appellant's debt was made with the petition; 2nd. That appellant should have given respondents the option to return the stock or pay its value.

The first demurrer was dismissed. The second was maintained, on the ground that appellant should have given respondents the option to return the stock or pay its value. And from that part of the judgment, appellant has taken this appeal.

The question for decision, appellant contends, is simply, has he sufficiently alleged a wrong done him to justify an action for damages? There is no allegation in respondents' answers that such is not the case. It is not pretended that the allegations, if true, do not justify the conclusions. But in effect, the objections urged by the respondents and the judgment appealed from are, that respondents should have the privilege of choosing their own method of redressing the injury they have done appellant.

Appellant urges that the election of the remedy, when there is more than one for an injury, lies with the party injured, and not with the party committing it; and if there be a choice of remedies, which, in this case, appellant doubts, he has elected his remedy,—one which the law clearly recognizes, and he is ready to abide by it. The respondents should meet the action by a plea of not guilty, and not by a plea, as they now do, that there is another way in which the appellant may get some sort of satisfaction should he adopt it, and which they, the wrong doers, prefer he should adopt.

There is some conflict in the decisions of the many learned judges, both in England and the United States, upon questions similar to the one in issue in this case.

The majority have held that the wrongful acts of the pledgee do not annihilate the contract between the parties nor the interest of the pledgor in the goods under it, and that the pledgee has the right to have his debt recouped in the damages which may be awarded. While a very able minority of judges have held that the bailment terminates by the wrongful act of the pledgee, the property reverts to the pledgor as its absolute owner, and as such absolute owner he is entitled to full damages. In either case, the Courts are unanimous in holding that the pledgor has a right of action to recover damages.

Sedgwick, Law of Damages, page 391. Ibid. page 392.

Appellant, if the contract of pledge still exists, can not demand the return of the stock pledged until he has satisfied the debt, or has offered to do so, either of which he is unable to do, and his inability is the result of the unlawful and fraudulent acts of respondents in the sale and delivery of the stock in question. The value of the stock appellant alleges to be ninety thousand dollars. Respondents sold it for thirty thousand, one-third of its value. The total liability on the stock was less than sixty thousand dollars. Thus appellant's property, which was his means of meeting his liabilities, has been sacrificed by the respondents, who now urge that he must do, what, by their wrongful acts, they have rendered it impossible for him to do.

Is appellant then to be deprived of all legal remedy? If the pretension of respondent and the judgment appealed from be correct, such is the inevitable result. And the general principle of law that every wrong has its legal remedy can not avail appellant.

Kerr on Actions at Law, page 45, says—"Now since all wrong may be considered as a privation of right, the natural remedy for every species of wrong, is the being put in the possession of that right, whereof the party injured is deprived. This may be effected, either by a specific restoration of the subject matter in dispute to the legal owner, as when the possession of lands or goods is unjustly withheld; or where that is not possible, or at least not

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an adequate remedy, by making the sufferer a pecuniary satisfaction in damages, to which damages the party injured has acquired an incomplete right the instant he receives the injury."

The judgment in question effectually deprives appellant of the application of this principle.

But the respondents have no legal right to the option which they demand, because they have voluntarily put it out of their power to return the stock in question by its sale and delivery to a *bona fide* purchaser at a public auction, who can hold the stock against the real owner.

Story on Bailments. Paragraphs 322, 346 and 349.

But it may be urged that appellant's action is not strictly in form one of damages. However that may be, the principle laid down by the authors on damages justifies the conclusions of the petition,—for says Mayne at page 284, Smith's second edition,—"the measure of damages is in general the value of the goods." Just what is asked by this petition.

Appellant alleges in his petition the fraudulent conversion of the stock in question, and does not urge that he is entitled to it *de plano*, but that he is entitled to its value as for a conversion,—and maintains that its value is to be determined by its highest market value between the conversion and the action.

Under all the circumstances the appellant is absolutely shut up to the action he has taken,—one for damages for the injury done him by respondents.

J. N. Greenshields for respondents :—

The second demurrer filed by respondents is based upon the ground that as it appears from the allegations of the petition made by appellant that he is the pledgor to respondents of the said stock and has not paid the respondents the amount of his indebtedness, and therefore has no right by law to demand possession of the thing pledged, and that he has no action other than to recover the stock pledged, and before proceeding with such an action must tender or put respondents in default to deliver over the stock held in pledge.

It is clear from the allegations of appellant's petition that the respondents held the said 3,000 shares of stock as collateral security for a loan of $25,000 received by appellant from Goodhue, in whose rights respondents now are, and also for a further and additional indebtedness the amount of which has not yet been determined, but as appears on his own petition is the subject of litigation.

Under the terms of article 1975 of our Civil Code it is clear that the debtor (the appellant here) cannot claim the restitution of the thing given in pledge until he has paid the debt in principal, interest and costs. The appellant has not paid any portion of the debt due to the respondents and for which the said stock is pledged as collateral security.

The present action or petition is in its nature one which asks that respondents should pay over the full value of the stock without in any way having placed respondents in default to deliver the same.

Respondents submit that the only course which appellant could take was to tender to respondents, the amount of his indebtedness and demand a delivery or transfer of the stock, and respondent refusing to transfer the same, appellants' proper course would be an action to recover the stock, and in default of respondents delivering the same, that they be condemned to pay the value thereof.

Respondents are entitled to deliver the stock as received by them upon their being paid the amount of appellant's indebtedness, and respondents should by said action be given the alternative of delivering the stock or paying the value, and in any event appellant has no right of action until he has paid the amount of debt to respondent or tendered the same.

The following was the judgment in appeal :—

" Considering that the petition of the appellant whereby he claims compensation in damages for the alleged unauthorized sale by the respondents, of shares of stock of the Royal Canadian Insurance Company, owned by the appellant and in pledge with respondents, is sufficient in

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law, if proved, to entitle him (the appellant) to a judgment against the respondents, and

"Considering, therefore, that there is error in the judgment rendered by the Superior Court of Montreal, on the 28th day of February 1885, maintaining the demurrer or *défense en droit* therein mentioned as *la seconde défense en droit*, and dismissing the said petition;

"The Court, etc., etc., doth reverse, etc., the said judgment, and proceeding, etc., doth dismiss the said demurrer, with costs in favor of appellant."

Judgment reversed.

A. R. Oughtred, attorney for appellant.

Greenshields, McCorkill & Guerin, attorneys for respondent.

(J. K.)

March 27, 1886.

Coram DORION, C. J., MONK, RAMSAY, CROSS, BABY, J J.

LUCY D. CHENEY ET AL.

(*Petitioners en nullité de décret in the Court below*),

APPELLANTS;

AND

ALEXIS BRUNET

(*Adjudicataire, Contestant in the Court below*),

AND

P. J. O. CHAUVEAU

(*Sheriff, Contestant in the Court below*),

RESPONDENTS.

Execution—Sheriff's sale—Usufruct.

A sheriff having seized on one defendant the usufruct of an immoveable and on the other defendants, the *nue propriété*, and advertised the sale in the form quoted in the report:

HELD:—1. That under the advertisement, the sheriff was bound to sell the property as a whole,—*i. e.* usufruct and *nue propriété* combined; and

that a sale of these rights separately made by the sheriff having resulted in surprise and prejudice to the defendants, it would be set aside, on petition *en nullité de décret* by defendants.

2. That usufruct is incorporeal right (*droit incorporel*) which, under C.P.C. 638, should have been set forth in the *procès-verbal* of seizure and also in the advertisement (C. P. C. 648) by mention of the title under which it is due.

In 1883, Dame L D. Cheney, one of the appellants, was usufructuary and her children, the other appellants, were *nus propriétaires* of a lot of land which was hypothecated to Wm. Francis et al. These creditors instituted an hypothecary action for their claim directed in terms of C. C. 2059, against both usufructuary and *nus-propriétaires*. On this they obtained judgment ordering *délaissement* or, in default, personal condemnation. No *délaissement* being made, execution issued and the sheriff seized the land, the usufruct as belonging to Dame L. D. C. and the *nue propriété* one third to each child, separate *procès-verbaux* being made. The sheriff's notice in the *Gazette* was in the following form :—

" Public notice is hereby given that the undermentioned lands and " tenements have been seized and will be sold, &c., &c.

[The names &c., of plaintiffs : The names &c., of defendants, and their capacities of usufructuary and *nus propriétaires*.]

" The lots of land hereinafter described seized as follows; to wit, the usu- " fruct as belonging to Dame L. D. C. during her lifetime and the *nue pro-* " *priété* as belonging to wit, one undivided third to L. V. D. and the other " two thirds to &c., &c., &c.

" 1o That certain lot of land &c., (described.)

" 2o That other lot of land &c., (described.)

" To be sold at my office, &c., &c., &c."

On the day of sale, Mr. Molson, an intending purchaser, sent a representative with authority to buy the first lot up to $6,000.

When the sheriff had read the usual documents, he put up for sale the usufruct of Dame L. D. C. *alone*, and announced that if that did not realize the judgment, he would *then* put up the *nue propriété* as a whole. Mr. Molson's agent, finding this mode different from what he expected, and having no means of distributing the total value placed on the property by his principal, ob-

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jected, but the sale was proceeded with, and the agent making no bid on the usufruct, it was adjudged to A. Brunet for $150. The *nue propriété* being then put up, was adjudged for $4,100 to Mr. Molson's agent, who was urged by bystanders to bid. All this had reference to the first lot of land described, and the two prices having exceeded the judgment, the second lot was not sold.

The defendants in the case, now appellants, filed a Petition *en nullité de décret*, under C. P. C. 714, on the ground that the "essential conditions and formalities prescribed for the sale had not been observed," and especially in this, that the sale had not been made in the manner announced,—which was that the property, *all rights combined*, would be sold,—and not *morcelé* into the separate rights,—and thus bidders were not notified so that they might ascertain by insurance tables, after learning the age of the usufructuary, the value of the usufruct. They also urged several technical grounds, informalities, &c., which are referred to in the judgments.

The plaintiffs declared *s'en rapporter à justice*, as did Mr. Molson. The adjudicataire Brunet appeared and defended his purchase,—while the sheriff appeared separately and maintained the regularity of his procedure and that his mode of sale was not only the only legal mode, but also that it was in conformity with the notices.

Evidence was made that the value of the usufruct was from ten to twenty times the $150 at which it was adjudged, and that the property as a whole was worth $6,000.

Judgment was rendered in the Superior Court on the 29th November 1884, by the Hon. Mr. Justice Taschereau, as follows:—

"La Cour, etc.....

"Considérant que quoique le jugement rendu sur l'action principale en cette cause fût en déclaration d'hypothèque, la condamnation portée contre les défendeurs devenait personnelle et pure et simple, faute d'option et de délaissement par eux, dans le délai requis, de l'immeuble en cette cause;

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"Considérant que l'exécution émise était contre les biens personnels des dits défendeurs et que, sur telle exécution, les demandeurs ne pouvaient faire saisir, et le Shérif ne pouvait prendre en exécution sur chaque défendeur que le droit que la loi lui reconnaissait sur le dit immeuble, savoir, l'usufruit quant à la défenderesse Dame Lucy D. Cheney et la nue propriété quant aux autres; que ces droits sont distincts et séparés et ont été séparément saisis et annoncés en vente au moyen des publications requises; que conséquemment la vente des dits droits immobiliers pouvait et devait régulièrement être faite par le dit Shérif séparément et distinctement, conformément à la dite saisie et les dites annonces;

"Maintient la contestation du dit adjudicataire A. Brunet et celle du Shérif, et renvoie et rejette la dite requête en nullité de décret, avec dépens, etc."

The defendants, petitioners *en nullité*, then appealed.

R. A. Ramsay for appellants.

A. B. Longpré for respondent adjudicataire Brunet.

A. Ouimet for sheriff, respondent.

DORION, C. J., said the majority of the Court were of opinion that the sale was irregular, and the adjudication must be set aside. The separation of the usufruct from the ownership was improper and not in accordance with law. It was obvious that the not selling the whole together operated a prejudice to the appellants. The property was sold for about one-half the sum that would have been bid for it if the whole had been offered together. The procedure was irregular for the reasons set forth in the judgment to be rendered. Usufruct is a *droit incorporel* as mentioned in C.P.C. 638, sec. 3. Vide Pothier, Cout. D'Or: T. 21, No. 2, p. 688 (Bugnet). Hericourt, Vente d'Immeubles, p. 225, No. 14. Property should not be *morcelé* needlessly. Pothier, Cout. D'Or: T. 21, No. 72, p. 701. (Bugnet). As the defendants might have given a more definite description of the property seized, and as the advertisement agreed with the seizure, the Court was disposed in reversing the judgment to do so without costs.

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The following is the judgment of the Court :—

"La Cour, etc.....

"Considérant que lorsque les biens qui font l'objet d'une saisie immobilière sont des droits incorporels, il doit être fait mention dans le procès-verbal de saisie du titre en vertu duquel ils sont dus, (Article 638, Code de Proc. Civile) ;

"Considérant que les annonces qui doivent précéder la vente de tels droits incorporels doivent contenir la même description d'iceux que celle insérée dans le procès-verbal de saisie, y compris la mention du titre en vertu duquel ils sont dûs, (art. 648, Code de Proc. Civile) ;

"Considérant que l'usufruit est un droit incorporel et que celui saisi sur l'appelante Dame Lucy D. Cheney n'a pas été saisi ni annoncé avec les formalités requises par les articles 638 et 648 du Code de Procédure Civile, mais qu'au contraire les annonces qui ont précédé la vente indiquaient que l'usufruit appartenant à l'appelante et la nue propriété appartenant à ses enfants sur chaque propriété saisie, devaient être vendus comme ne faisant qu'un tout, ce que le shérif avait le droit de faire en l'absence de toute requisition au contraire de la part des parties intéressées ;

"Et considérant qu'au lieu de vendre les propriétés saisies conformément aux annonces, l'usufruit et la nue propriété ne faisant qu'un tout, le shérif a procédé séparément à la vente de l'usufruit et de la nue propriété de l'immeuble décrit dans le procès-verbal et dans les annonces sous le numéro un, comme formant deux lots distincts et que la vente ainsi faite a été préjudiciable aux intérêts des appelants et qu'elle est illégale et nulle ;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour de première instance ;

"Cette Cour casse et annule le dit jugement, et procédant à rendre le jugement que la dite Cour de première instance aurait dû rendre, annule et met à néant le décret fait séparément le cinq avril 1884, de l'usufruit à Alexis Brunet, et de la nue propriété à Herbert Darling de l'immeuble No. 1861, quartier St-Antoine de Montréal, décrit

au procès-verbal de saisie en cette cause sous numéro un ; chaque partie payant ses frais tant en cour de première instance que sur l'appel."

(*Dissentiente*, l'Honorable M. le juge Baby).

R. A. Ramsay for appellants.

Longpré & David for respondent Brunet.

A. Ouimet for respondent Sheriff.

(R. A. R. & A. B. L.)

September 25, 1886.

Coram DORION, C.J., RAMSAY, TESSIER and CROSS, JJ.

JOHN L. MORRIS,
(*Adjudicataire in Court below*),
APPELLANT;

AND

THE CONNECTICUT & PASSUMPSIC RIVERS R. R. Co.,
(*Petitioners en nullité de décret*),
RESPONDENTS.

Execution—Sale of shares—C. C. P. 595.

Where a number of shares of railway stock were seized and advertized to be sold in one lot, and neither the defendant nor any one interested in the sale requested the sheriff to sell the shares separately, and it did not appear that there was any intention to defraud, or that any loss had been sustained in consequence of the shares being sold in one lot, but, on the contrary, that such mode of sale was advantageous to the creditors, the sale was held good and valid, although the amount realized thereby was far in excess of the judgment debt for which the property was taken in execution.

The appeal was from a judgment of the Superior Court, Montreal (JOHNSON, J.), May 30, 1885, maintaining a petition *en nullité de décret*.

JOHNSON, J., in rendering judgment in the Court below, made the following observations:—

This is a petition by the Connecticut and Passump-

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sic Rivers R. R. Company, creditors of Barlow the defendant, to set aside a sheriff's sale of a number of shares in the Montreal, Portland and Boston Railway Company, seized as belonging to him. The seizure was made by execution issued in the suit of *O'Halloran* v. *Barlow* to levy $1,002.54, interest and costs, amount of the judgment recovered by the plaintiff in that case; and 7,924 paid up shares were seized and sold in one lump to Mr. Morris for the sum of $12,010.

There is no doubt that the petitioners who want to set aside this sale were and are creditors of Barlow, the defendant, for an immense sum of money, of which $150,000 are now past due; and that Barlow at the time of the sheriff's sale, and long before, was totally insolvent. Under these circumstances, the petitioning creditors say that the officer had no right or power to sell all these shares, or to put them up in one block, as he did, and that even any consent of the defendant to such a thing would be illegal in itself, and inoperative as to his creditors, by reason of his insolvency divesting him of any control to their prejudice, of his estate, of which these shares were a large if not the principal asset. The defendant and the *adjudicataire*, both of them, contest this petition, and they contend that Barlow's consent was validly and effectually given to sell in this manner. A very great deal of attention was bestowed by counsel in arguing every question deemed to arise in this case; but I think there are really only two questions: 1st. Can the sheriff, in any case where it is avoidable, levy more than is necessary to satisfy debt, interest and costs? 2nd. Was the proceeding here sanctioned by law, or in any manner authorized or validated by the defendant's consent? The general rule is thus stated in art. 595, C. P. "The sale must not proceed beyond "the amount necessary to pay the debt in principal, in- "terest and costs." That is the rule: but obviously there are necessary exceptions, as in the case of seizure of an indivisible object of great value for a small debt. In such a case as that, of course, and of necessity, the sheriff must sell the thing seized for what it will fetch, and any sur-

plus, after deducting debt, interest and costs would belong to the debtor or to his creditors, according to circumstances. But where there is no such necessity, it is of course otherwise; and in cases where a selection or order of sale can be observed, the defendant has his rights; and the article cited, therefore, not only prohibits the sale beyond the amount to be levied; but it connects that provision with another. for it goes on to say: "*to this end*, the "judgment debtor has the right to determine *the order in* "*which* the effects are to be put up to sale." That is to say, to the end that his property may not be uselessly sold, the defendant has the right of indicating a mode of sale with the view of restricting it to the mere amount wanted to pay his debt, etc.; but nowhere does the law give him any power to *extend the sale* for any purpose beyond the amount leviable: (in the present case, more than ten times the amount).

So that what was done here appears to have been this: a defendant, utterly insolvent, gives what he calls a consent, which if it is to be called a consent at all, (though I should rather call it a device) was a consent to deprive his creditors of all or most of his property; but whatever it was, or whatever its effect upon his creditors' rights, it was an act or an attempt to effect that which the law does not give a defendant in any case, a shadow of authority to do. It was an act not to regulate the order in which effects were to be put up to sale, with a view of giving the debtor a benefit contemplated by the law, viz, the benefit of keeping all his property, except so much of it as had necessarily to be sold; but one by which he assumed to order or agree that ten times more than was necessary should be sacrificed. I say sacrificed, because it was uselessly sold, as far as the purposes of the execution of the judgment went; and not in the sense of its being a sale at a ruinous price: for there is evidence that this stock was of little value beyond that of giving to the buyer the control of the road: the same sort of value as a key that is really worth about six pence, but that can alone open a safe. This consideration, however, though it

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was made one of the grounds of the petition that the stock sold for less than its value, has nothing to do with the case in the view I take of it. By law, a creditor or any interested party can set aside a sheriff's sale under certain circumstances (see art. 714, C. P.) I do not deem it necessary to discuss the circumstances here, further than to say that it appears to me essential that the usual formalities should be observed; and especially essential to the due administration of justice where the interests of creditors are concerned that an illegality of this kind should not be permitted. It was urged by the defendant and by the purchaser that the petitioners had waived their right by filing an opposition on the proceeds of the sale. I cannot agree to that. Then it was also said for the same parties, that the petition contained no precise allegations of fraud or collusion; but it contains plain allegations of illegality and of facts which constitute fraud in law; and I am of opinion to grant the conclusions.

Sept. 20, 1886.] *Hatton, Q. C.*, and *Geoffrion, Q. C.*, for the appellant :—

The question in this case is simply as to the validity of the sale in block of 7,934 shares of the Montreal, Portland & Boston Railway Company, which were sold under execution in April, 1884, under a judgment in a suit of O'Halloran against Bradley Barlow. The shares in question constituted the majority of the capital stock of the M. P. & B. Railway company. The shares of this road are absolutely worthless, the road being insolvent, but *en bloc*, they give a controlling influence in the company, and to acquire this, they were bought by the appellant for over $12,000. The judge in the court below annulled the sale, on the ground that the disposal of the shares in one lump was illegal. It is submitted, on the part of appellant, that the sale was made in the only way in which it was possible to effect a sale of the shares at all. It is proved that the shares had no intrinsic value whatever. No one would have bid for them if one share or one hundred shares had been offered separately. But for the sake of acquiring a controlling influence, there were parties will-

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ing to bid for the whole lot. Mr. O'Halloran, the party who brought the shares to sale, was one of the bidders. He made no objection to the mode of sale, and it is proved beyond a doubt that this was the only mode in which the property could be advantageously disposed of. The price was paid immediately by the appellant, and there is no ground whatever for questioning the validity of the sale.

Lonergan, for the respondent :—

The judgment to be satisfied was only $1,002, and article 595 of the Code of Procedure says, the sale must not proceed beyond the amount necessary to pay the debt in principal, interest and costs. The sale might have been of one share, with option to take more at the same rate.

RAMSAY, J. :—

This case comes up on appeal from a judgment maintaining a petition *en nullité de décret*. The sole ground urged was that a sale of 7,924 shares of the Montreal, Portland & Boston Railway company had been sold by the sheriff *en bloc*. The argument for the respondents was that under article 595 of the Code of Procedure, the sale must not proceed beyond the amount necessary to pay the debt, in principal, interest and costs. This article does not mean that the sheriff shall not sell according to his seizure. The power given by the law is that the debtor may indicate the lots to be sold, so that if there is more than enough to satisfy the judgment, the rest of the property shall not be sold. Regularly, the sheriff sells according to his seizure, and he can only depart from this order on the demand of the defendant. This court recently, in an analogous case, *Cheney & Brunet*,[1] decided that the sheriff must sell according to his advertisements. The person to watch the regularity of such things is not the sheriff but those who are interested in the sale. Here it appears that the shares sold had no value in themselves. They were only valuable because, from the number, they gave a controlling influence over the road. The sale was no hole and corner affair ; every one interested was

[1] M. L. R., 2 Q. B. 298.

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there, or could have been there. We are told that some of the great capitalists of the country were present, and that they bid up to a certain amount and then they allowed the shares to be knocked down to the appellant. Under these circumstances, the judgment annulling the sale must be reversed, and the purchaser must be allowed the benefit of his purchase. The people now complaining might have enjoyed the same advantage if they had chosen to bid more. Not having done so, they cannot now be permitted to set aside the sale, in order that they may have another opportunity to buy. As an abstract principle, it makes no difference whether the shares were worthless or whether they were shares of the Bank of Montreal or any other bank. There was no pretence of collusion or fraud, and the sheriff only sold as he was bound to do.

The judgment of the Court below must therefore be reversed with costs.

DORION, CH. J.:—

Barlow, the defendant upon whom these shares were sold, ratified the sale: it is a creditor who comes in, and says that the sale is null because the sheriff sold 7,000 shares in one lot. The pretension of the respondent amounts to this, that the shares should have been sold share by share, for if it was wrong to sell 7,000 shares together it would have been wrong to sell ten shares together. The respondent does not pretend that the shares were sold below their value. The creditors were in reality benefited by the sale of the whole together, for by that proceeding the expense of a number of sales was avoided. There may be cases in which such gross injustice would appear, that the Court might be disposed to interfere in order to protect the interests of the creditors; but nothing of that kind is shown here. It is clear from the evidence of record that it was for the advantage of the creditors that the shares should be sold in one lot. There is no allegation of fraud, and under the circumstances we are unable to see any ground for setting the sale aside.

The judgment is as follows:—

"Considering that the 7,924 shares of capital stock of

the Montreal, Portland & Boston Railway Company were seized on the defendant Bradley Barlow, and advertised to be sold in one lot;

"And considering that neither the said Bradley Barlow nor the respondents ever requested the sheriff to sell the said shares separately, or in other manner than according to the terms of the notices given by the sheriff;

"And considering that the said Bradley Barlow has approved of the said sale;

"And considering that the respondents who, as creditors of the said Bradley Barlow, claim by their petition to set aside the sale of the said 7,924 shares of stock, have not proved that the sale of said stock was made to defraud them of any just rights, nor that they have suffered any injustice from such sale;

"And considering that the law does not require that railway or other stock should be seized and sold separately, or in any given number of shares, unless before the sale this is demanded by the debtor or other interested parties, and that it appears that such separate sales would be more advantageous to such debtor and his creditors;

"And considering that there is error in the judgment appealed from, to wit, the judgment rendered by the Superior Court at Montreal on the 30th of May, 1885;

"This Court reversing the said judgment of the Superior Court, and proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the petition of the said respondents by which they prayed that the sale made by the sheriff to the appellant of the said 7,924 shares of stock be annulled and set aside; and the Court doth further condemn the said respondents to pay the costs as well in the Court below as on the present appeal, those in this court to be taxed as in a first class case."

Judgment reversed.

J. C. Hatton, Q.C., attorney for appellant.

C. A. Geoffrion, Q.C., counsel.

Lonergan, attorney for respondent.

(J. K.)

June 30, 1886.

Coram DORION, C. J., MONK, RAMSAY, CROSS and BABY, JJ.

THE CANADIAN PACIFIC RAILWAY CO.
(*Defendant below*),
APPELLANT;

AND

JOSEPH GOYETTE,
(*Plaintiff below*),
RESPONDENT.

Employer—Accident to workman—Responsibility of employer.

A gang of men engaged by a railway company were proceeding on a construction train, to the place where they were about to be employed. Platform cars were provided by the company, but the men (of whom plaintiff was one), mounted upon a car laden with lumber, and the lumber giving way, the plaintiff and others were injured:

HELD:—That it was the duty of the company's officials to have prevented the workmen from riding in such a dangerous position, or, at least, to have warned them very clearly of the peril, and the company were held responsible for the damages suffered by the men.

The appeal was from a judgment of the Superior Court, Montreal, (MOUSSEAU, J.), April 8, 1885, maintaining the respondent's action of damages.

The judgment of the Court below (which was affirmed in appeal), was in these terms:—

"La Cour, etc...

"Attendu que le demandeur allègue qu'ayant été vers le deux de juin dernier, engagé par la défenderesse pour aller travailler comme journalier, à raison d'une piastre et demie par jour, au chemin de fer que la dite compagnie faisait construire, sur la ligne de la Mantawan, dans la province d'Ontario, il fut transporté par la dite défenderesse à environ trois cents milles plus loin qu'Ottawa, où on le fit monter avec d'autres hommes sur un char découvert et chargé de pièces de bois; que ce char étant trop chargé, et les piquets et les liens qui retenaient les

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dites pièces de bois n'étant pas assez forts, les dites pièces tombèrent avec plusieurs hommes, entre autres le demandeur ; que celui-ci fut blessé sérieusement et rendu incapable de travailler pendant plusieurs mois, et qu'il a par suite de cet accident, causé par la faute et la négligence de la défenderesse, éprouvé des dommages qu'il estime à quatre cents piastres, et qu'il réclame de la défenderesse ;

" Attendu que la défenderesse a plaidé que l'accident était dû seulement à la négligence et à l'imprudence du demandeur qui s'était placé dans une position dangereuse, contre les avertissements des employés de la défenderesse ;

" Considérant que le demandeur a prouvé les allégations essentielles de sa demande, qu'il se trouvait lors de l'accident dans la condition d'un passager ordinaire, et non dans celle d'un serviteur de la compagnie : ce qui apparait surtout par le fait que la dite compagnie devait retenir sur ses gages futures le prix de son passage ; que la dite défenderesse devait, en conséquence, veiller à la sûreté du demandeur plus soigneusement qu'elle ne l'a fait, et qu'elle est responsable du dit accident et de ses suites ;

" Considérant que le demandeur a prouvé qu'il a souffert des dommages pour un montant de $210 tant pour le temps qu'il a perdu que pour les souffrances qu'il a éprouvés par suite du dit accident ;

" Renvoie le plaidoyer de la défenderesse, et condamne cette dernière à payer au demandeur la dite somme de $210, avec intérêt, etc."

May 18, 1886.] *H. Abbott*, for appellant.

L. O. David, for respondent.

RAMSAY, J. :—

These are four appeals in actions for damages arising out of a railway accident, by which respondents were injured. There is no contest as to the nature of the accident or the amount of damages. The whole question is as to the appellant's responsibility. Through a man called

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Thomson, appellant hired 80 men to work on their line, agreeing to pay certain wages and to give free passage to the place where the work was to be performed. At a certain point, the men were to take a construction train. When they arrived at this place, a train was waiting to carry them to their destination, but the only accommodation prepared for them was a platform car, loaded with *lumber*. However, without any special instructions as to where they were to go, they were ordered to take their places at once. Thereupon Thomson and his men threw their things on to the loaded car and got up themselves. The station master, seeing that this was an inconvenient or unsafe arrangement, had two platform cars attached to the train for the accommodation of the workmen. It seems that some of the men got on to these cars, but the greater number, Thomson among the rest, remained on the loaded car. The train then started, and two or three miles from the station, one of the posts put to keep the lumber in its place broke, and the lumber and several of the men, among whom were the respondents, were precipitated to the ground. The respondents were all more or less injured, and brought actions against the Company.

The Company contends that the men were not authorized in getting on to the loaded car, that it was manifestly a rash thing to do, that therefore they did it at their own risk, that they were warned of the danger, that they were ordered to leave and to go to the unloaded platforms provided for them, and that they obstinately refused to move.

If either branch of this defence had been proved, it would have been a complete answer to the action, but the reverse is the case. The men were ordered to take their places when no other cars were there. They got on to the loaded car with Thomson, and without any objection by any of the officials. We are then told by three persons that orders were given to the men to get on to the unloaded cars. It was seen that this was the turning point of the case, and an effort was made to establish the giving of this order. Three witnesses speak of it; but the three accounts are different. One man said he heard and did not move;

an official made signs, when, we are not told; and a third gave the order, whether in French or English, or in both, it is hard to say. But one thing certain is, that Thomson, who had charge of the men, sat still, at all events, till after the train was in motion. Then he and two or three others, —whether alarmed by the oscillation of this over-loaded car, or knowing the peril, otherwise we don't know,— passed to the other platform. One of the respondents tried to follow, but grew giddy and desisted. It is not immaterial to observe that Thomson has not been produced, while another witness, who was injured, and indemnified by the Company, has been examined. It is very material that there should not be any doubt as to the fact that the men were sufficiently warned of the danger and ordered to leave, for the train ought not to have proceeded till the order to leave the loaded car was obeyed, or till measures of so marked a character, had been taken, as to leave no doubt that the proper orders were given, and that they were wilfully disobeyed. Thomson's evidence would probably have made all this very clear, and we have it not, nor any explanation why Thomson is not produced. I am to confirm.

CROSS, J. :—

The action is for the recovery of damages for injuries sustained by respondent falling from cars of the appellant, lumber on which he was sitting getting detached from its fastening and falling off the car, carrying with it a number of workmen employed by the appellant, including the respondent, then on their way to the locality where they were to be employed in the construction of the line.

The defence was that the injury sustained by the respondent resulted from his own fault and refusal to obey the directions given him by the officials of the company not to ride on the lumber car in question, but to go upon the platform cars, specially provided for carrying the workmen, and was without fault on the part of the company.

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There is proof of injury sustained from the cause alleged, and the amount of damage could not reasonably be made the subject of complaint. The real question in the case is, who was in fault?

It appears that all the gang of some eighty men in charge of a foreman, named Thompson, got on this lumber car, at Sudbury. It was a construction train destined for the conveyance of men and material to the point required. Engley the yard-master, perceiving that there was danger in the position taken by the men, ordered two platform cars to be put on for the accommodation of the men, and directed them to get off the lumber car, and go on the platform cars forward; they paid no attention to what he said and laughed at him. McCormack the conductor, also warned them off, both in French and in English, but without effect. Davis, a disinterested witness, heard the warning given, and Entwistle, one of the sufferers, gives testimony to the same effect. In consequence of the warning, some of the men, including the foreman Thomson, left the lumber car and went on the platform, and of course escaped the injury.

The witnesses examined for respondent state generally that they did not hear any warning given, that they were told to get on the lumber car, and were refused admission into a van which formed part of the train.

I think there is proof of the warning, and that there was sufficient room on the platform cars to accommodate the men.

The question remains whether the officials of the Railway, seeing themselves, and being most competent to appreciate the danger, should have been satisfied with the warning as given; whether, having the authority to do so, they should not have insisted on the men leaving their dangerous position, or at least warning them that they would remain there at their own risk and peril.

It is pretended that the lumber was insufficiently staked to keep it on; but this is unreasonable. It was insufficient to carry a load of men on top of it, and had not

been staked in view of such a contingency, but was probably sufficiently staked to retain the lumber itself, and if defective in this respect, it could have injured no one by falling off, had they not exposed themselves to the danger by choosing to take passage on top of it.

I think that a disposition, often exhibited by men, to be foolhardy of, and indifferent to danger, especially where they may entertain hopes that the consequence will fall upon a party able to answer for it, is not a tendency to be especially encouraged. I would hold that every individual should exercise a reasonable caution on his own behalf for the avoidance of danger equally apparent to him as to the party to whom he looks for protection, the obligation to the exercise of such caution being one of the best guarantees against accidents. I admit that the tendency of recent decisions is toward a more rigid rule of responsibility than has accorded with my ideas of justice.

I have great doubt as to the Railway Company being held liable, but do not dissent because I think the current of decisions is to hold companies, in such cases, to a strict liability.

Judgment confirmed. [1]

Abbott, Tait & Abbotts, attorneys for appellant.
Longpré & David, attorneys for respondent.
(J. K.)

[1] Judgment was also confirmed in the similar cases of same appellant and Tremblay, Beauchamp, and Payette, respectively, respondents.

September 21, 1886.

Coram DORION, C. J., MONK, TESSIER, CROSS, BABY, JJ.

JOHN ROSS ET AL.,
(*Defendants below*),
APPELLANTS;

AND

WILLIAM L. HOLLAND,
(*Plaintiff below*),
RESPONDENT.

Location ticket—Default to perform settlement duties—Cancellation of license—23 *Vict.*, *c.* 2, *s.* 29—32 *Vict.* (*Q.*), *c.* 11—36 *Vict.* (*Q.*), *c.* 8.

A location ticket of certain lots was granted to G. C. H., in 1863. In 1874, the Commissioner of Crown Lands registered a transfer of the location ticket from G. C. H. to respondent. In 1878, the Commissioner cancelled the location ticket for default to perform settlement duties.

HELD:—That the registration by the Commissioner, in 1874, of the transfer to respondent, was not a waiver of the right of the Crown to cancel the location ticket for default to perform settlement duties, and the cancellation was legally effected.

The appeal was from a judgment of the Superior Court, Ottawa district, (MCDOUGALL, J.), maintaining an action of trespass.

By a location ticket, bearing date June 9, 1863, two lots of land, in the township of Portland, in the county of Ottawa, were granted to George C Holland, the respondent's *auteur*. In 1878 the Commissioner of Crown Lands cancelled the sale of these two lots under the authority of 32 Vict., chap. 11, and 36 Vict., chap. 8, and notice of such cancellation was given in the *Official Gazette*. Subsequently, licenses were issued by the Crown Lands department to the appellants, merchants, of Quebec, which licenses include the two lots in question. Under these licenses, the appellants entered upon the lots, and cut timber; whereupon the present respondent, treating the

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cancellation as void, brought an action for trespass. The Court below maintained the action, and the present appeal was from that decision.

March 24.] *Irvine, Q.C.*, for the appellants:—

The principal question in the case is the validity of the cancellation. It was made upon the report of one Currie, an officer of the Crown Lands department, who, in 1878, reported that no improvements of any description had been made, and the grant of the lots was cancelled for non-fulfilment of conditions. The statute regulating the sale of Crown Lands, which was in force at the time of the location in question (23 Vict., c. 2, s. 29) provides that the commissioner may cancel any location ticket or license, if he is satisfied that any locatee, or any assignee claiming under him, has violated any of the conditions of location. In 1869, the Quebec legislature passed the 32 Vict., c. 11, amended by 36 Vict., c. 8, s. 9. The Act of 1869 makes provision for the cancelling of grants or locations in terms similar to those of the previous Act. Sect. 9 of the Act of 1872 provides that whenever the commissioners shall cancel any sale or location, such cancelling shall effect a complete forfeiture of all moneys paid by the occupant, but the commissioner may grant such compensation as he may consider just and equitable. If the cancellation in this case was legal, the appellants were not trespassers, and the action ought to be dismissed. The question, therefore, comes to be this: Was the cancellation legally effected? It is urged on the part of the respondent that the conditions are comminatory only, and can not be enforced, unless the locatee is first put in default to fulfil them; and secondly, that there was an alleged undertaking on the part of the Crown to dispense with the performance of the conditions of these lots. But the statute expressly gives the power of cancellation which was exercised; and as to the second point, the Commissioner was only authorized to grant the location tickets upon the conditions contained in them.

Fleming, Q.C., and *Church, Q.C.*, for respondent:—

The purchaser had paid part of the purchase money, the

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land had passed out of the possession of the Crown, and could only revert to the Crown by putting in force the resolutory clause before the proper tribunal and in a legal way. The lots were granted before Confederation, and not being the property of the Crown or of the province of Canada, they did not vest in the province of Quebec. It is further contended that the conditions had in fact been complied with. No notice was given of the intention to cancel, nor of the cancellation, except its publication in the official *Gazette*. The cancellation clause must be considered comminatory, and the party allowed time to comply with the conditions.

CROSS, J., (for the whole Court) :—

This action was brought by the respondent against the appellants, to recover a quantity of logs cut by the appellants on lots Nos. 11 and 12 in the 4th range of the township of Portland, and in default of their delivery, to pay $4,000 as their value, also in either case, to pay $2,000 for damages done to the property. The respondent claimed to be proprietor under a location ticket from the Crown to Geo. C. Holland, 9th June 1863, granted by the local agent.

Appellants pleaded that the sale or location ticket to respondent had been cancelled on the 28th May 1878, by the Commissioner of Crown Lands, acting under the Statute of Quebec, 32 Vict., c. 11, and 36 Vict., c. 8, and the lots restored to the limits held from the Crown by the appellants.

The respondent, in reply, claimed to have performed the settlement duties on these lots by road work and by clearings and buildings made on lots Nos. 15 and 16 of range 7, Portland West, and a waiver of the performance of settlement duties by the registration in 1874 by the Commissioner of Crown Lands of the transfer from Geo. C. Holland to the respondent of the lots in question.

The appellants held a license from the Crown to cut timber on a considerable extent of land including the lots in question, which license was in force at the time

they cut the timber claimed by the respondent in this cause, viz., in September 1878.

The location ticket invoked by the respondent contained among others the conditions following :—

"This sale, if not disallowed by the Commissioner of Crown Lands, is made subject to the following conditions, viz.: — The purchaser to take possession of the land within six months from the date hereof, and from that time continue to reside on and occupy the same, either by himself or through others for at least two years, and within four years, at furthest, from this date, clear, and have under crop a quantity thereof in proportion of at least ten acres for every one hundred acres, and erect thereon a habitable house of the dimensions of at least sixteen by twenty feet. *No timber to be cut before the issuing of the Patent, except under license,* or for clearing of the land, fuel, buildings and fences; all timber cut contrary to these conditions will be dealt with as timber cut without permission on Public Lands. No transfer of the purchaser's right will be recognized in cases where there is default in complying with any of the conditions of sale. *In no case will the Patent issue before the expiration of two years* of occupation of the land, *or the fulfilment of the whole of the conditions,* even though the land be paid for in full. Subject, also, to current licenses to cut timber on the land, and the purchaser to pay for any real improvements now existing thereon, belonging to any other party, and further subject to all mining laws and regulations.—Agent.

Caution.—If the Commissioner of Crown Lands is satisfied that any purchaser of public lands, or any assignee claiming under him, has been guilty of any fraud or imposition, or has violated *or neglected to comply with any of the conditions of sale,* or if any sale has been made in error or mistake, he may cancel such sale and resume the land therein mentioned, and dispose of it as if no sale thereof had been made.—Extract from Sec. 20, Act 32 Vict. Chap. 11."

The Statute in force regulating the conditions of holding and cancellation of concessions of Crown Lands at the time the location in question was issued, was the 23 Vic., ch. 2, which by section 29 provided:

"If the Commissioner of Crown Lands is satisfied that "any purchaser, grantee or locatee, or lessee of any Public "Land or any assignee claiming under or through him, has "been guilty of any fraud, or imposition, or has *violated* "*any of the conditions of sale, grant,* location or lease, or of the "License of Occupation, or if any such sale, grant, location "or lease, or license of occupation, has been or is made "or issued in error or mistake, he may cancel such grant, "location, lease or license, and resume the land therein

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" mentioned and dispose of it as if no sale, grant, location " or lease thereof had ever been made; and all such can- " cellations, heretofore made by the Governor-in-Council, " or the Commissioner of Crown Lands, shall continue " until altered."

The statutes in force at the time the Commissioner of Crown lands undertook to cancel the location ticket for the lots in question, was the 32 Vic., ch. 11, as amended by 36 Vic., ch. 8, which by section 9 provides:

" Whenever, under the twentieth section of the said Act, " the Commissioner of Crown Lands shall cancel any sale, " grant, location, lease or license, such cancelling shall " effect a full and complete forfeiture of all moneys paid " by the purchaser, grantee, occupant or lessee, whether " in part or full payment, or for any expenses or improve- " ments made; but the said Commissioner may, in all " such cases, grant such compensation or indemnity as he " may consider just and equitable.

" Provided, that whenever a location ticket shall have " been cancelled, notice thereof shall be given in the " Quebec Official Gazette, and posted at the door of the " Church nearest to the lot or lots, the location ticket of " which shall have been cancelled; and it shall be lawful " for the holder of the said lot or lots, within sixty days " from the said publication and posting up of the said " notice, to appeal to the Lieutenant-Governor-in-Council, " and the Commissioner of Crown Lands shall not dispose " of the said lots in favor of any other person, until the said " delay is expired, or the Appeal, if any, is decided."

The cancellation of respondent's license took place on the 20th May, 1878, and is in the words following:—

" Under the authority of the Act 32 Vic. cap. 8, sec. 9, " of the Province of Quebec, I, the undersigned, do hereby " cancel the sales of the undermentioned lots of land for " non-fulfilment of the conditions thereof, viz: Township " of Portland, sale No. 8891, lots 11 and 12, Range 4. Name " of Purchaser, sold to George Holland. Assigned to W. " L. Holland.

Signed, E. C. TACHÉ, *A. C.*"

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All the requisite formalities to conform to the prescribed rules seem to have been observed in this case in order to the cancellation.

The learned Judge of the Superior Court declared this cancellation null and void, as well as the license granted to the appellants for the years 1878 and 1879; also that the respondent was proprietor of the logs cut upon said lots by the appellants, who were ordered to restore the same or pay their value, and further to pay damages for their trespass.

This Court cannot concur in the view of the case taken by the Court below. Apart from the question as to whether the Courts have authority to interfere with the discretionary exercise of a duty imposed by Statute upon the executive or administrative officer of the Government, the evidence shews clearly that the settlement duties undertaken by the first grantee, George Holland, were never fulfilled by him, nor by his transferee, W. L. Holland, now respondent; nor has it been shown that the Crown ever waived any of these conditions or accepted an equivalent therefor by work or improvements made on other lots, or by other parties, and neither by the fact of the receipt of the price or the registration of the transfer from George Holland to W. L. Holland, did the Crown waive their right to cancel the sale. The respondent may have established an equitable case for some kind of consideration from the authorities, but the Court is powerless to assist him to obtain any redress on this account. We can only administer the law as we understand the legal rights of the parties to be, and in this view we are constrained to reverse the judgment of the Court below, and to dismiss respondent's action.

The judgment is as follows:—

"Considering that the respondent bases his demand, and the right to the conclusions by him taken in this cause, upon the location ticket issued by the local Crown Lands Agent, on or about the 9th of June, 1863, in favor of George C. Holland, for the sale to him of lots Nos. 11 and 12, in

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the 4th range of the Township of Portland (west), afterwards transferred to the now respondent, Wm. L. Holland;

"Considering that said location ticket was afterwards, on the 28th May, 1878, duly cancelled by the assistant commissioner of Crown Lands for non-performance of the settlement duties required as well by said location ticket as by law, and the respondent was duly notified of such cancellation;

"Considering that at the time of the alleged grievances of which the respondent has complained by his declaration in this cause, the appellants were duly licensed by the Crown to cut timber upon said lots 11 and 12, in the township of Portland, and were not trespassers in anything done by them thereon, but were within their rights in cutting timber thereon, and are not by reason thereof liable to the respondent for any damages;

"Considering that the respondent has failed to prove any existing lawful title to the timber, cedar, ash and pine trees by him claimed by his said action, or that he has suffered any damage for which the appellants are bound to indemnify him, or that the appellants were trespassers upon said lots Nos. 11 and 12;

"Considering, therefore, that there is error in the judgment rendered by the said Superior Court at Aylmer, in the district of Ottawa, on the 25th of September, 1883, the Court of our Lady the Queen, now here, doth reverse, annul and set aside the said judgment, and doth dismiss the action of the respondent with costs."

Judgment reversed.

Robertson, Ritchie & Fleet, attorneys for appellants.

J. R. Fleming, attorney for respondent.

(J. K.)

September 21, 1886.

Coram DORION, C. J., RAMSAY, TESSIER, CROSS and BABY, JJ.

JAMES G. BOYCE,

(*Plaintiff in the Court below*),

APPELLANT;

AND

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD,

(*Defendant in the Court below*),

RESPONDENT.

Life Insurance—"Declarations and statements" of application—Increase of risk—Intemperate habits.

The application, after the usual answers and declarations, contained an agreement that should the applicant become as to habits so far different from the condition in which he was then represented to be as to increase the risk on the life insured, the policy should become null and void. The policy stated by its terms that if any of the "declarations and statements" made in the application should be found in any respect untrue, the policy should be null and void. The applicant stated himself to be of temperate and sober habits. It was proved that he became intemperate during the year preceding his death.

HELD:—1o. That the applicant's agreement as to change of habits was included among the "declarations or statements" of the application, and as such became an express warranty.

2o. That the contract thus formed was valid, and became binding on the assured and his assignees.

3o. That in order to void this contract, it is sufficient to prove that the change of habits of assured was such as to increase the risk on his life, even though death be not proved to have resulted therefrom.

4o. That in the present case, a change of habits was proved, which in its nature increased the risk on the life insured.

The appeal was from a judgment of the Superior Court (MATHIEU, J.), of the 19th February 1884, in favor of respondent.

The appellant was holder of a Policy of Insurance issued by the company respondent, on the 27th September 1876, on the life of one W. A. Charlebois, for the sum of $3,000.

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The policy was issued on an application signed by the said Charlebois, on the 3rd August 1876. This application contained the following clause: "It is hereby agreed that "this application shall form the basis of the contract of "insurance herein applied for, and the same shall form part "of said contract as if therein recited, and that all an- "swers and declarations contained in this application "are and shall be taken to be strict warranties, and that "should the applicant become as to habits so far different "from the condition in which he is now represented to "be, as to increase the risk on his life..... the policy "shall become null and void and all payments made "thereon shall be forfeited." In answer to questions contained in the form of application, Charlebois declared his habits to be temperate and sober.

The Policy of Insurance states that "if any of the de- "clarations or statements made in the application for "this policy (upon the faith of which this policy is issued) "shall be found to be in any respect untrue..... then "and in such case, this policy shall be null and void."

The subject of the policy, W. A. Charlebois, died on the 17th September 1882.

After furnishing proof of his death, the appellant, as transferee of the policy, claimed the amount thereof from the company, who refused payment.

It was proved, by his wife and by friends, that his habits underwent a change during the last year of his life and that he took to drinking heavily.

Medical opinion was divided as to the cause of death, Dr. Dugdale and Dr. Alexander holding that Charlebois died of dropsy, produced by heart disease, and that intemperate habits did not increase the risk to an appreciable degree, while Dr. Hingston, his regular medical attendant, stated that he died of disease of the liver, and that his intemperate habits materially increased the risk.

Maclaren, Q.C., and *J. N. Greenshields* for appellant:—

The "declarations or statements" of the application do not extend to a promise or undertaking of the applicant. This undertaking consequently is not referred to

in the policy and is not a warranty. The undertaking is, in its nature impossible, as no one can say what change in habits is sufficient to increase the risk on the life insured.

The proof does not show that the habits of insured hastened his death, or in any way increased the risk on his life.

N. T. Rielle for respondent:—

The promise made by the insured was simply a promissory declaration, and as such was part of the "statements or declarations" of the application, and was so referred to in the policy as to make part of it and to become a promissory warranty. Any breach of this warranty therefore voided the contract.

It was not necessary to prove habitual drunkenness in order to show intemperate habits. Insured had so changed his habits as to increase the risk on his life.

Authorities cited for respondent:

May on Insurance, (ed. 1882), s. 180.

Bliss on Insurance, (ed. 1874), pp. 61–85.

Knecht v. *Mutual Life Ins. Co.*, 35 Am. Rep. 641.

Knight v. *Mut. Life Ins. Co.*; and *Jefferies* v. *Life Ins. Co.* (Sup. Ct. U. S.) Reporter's note to same case.

Union Mut. Life Ins. Co. v. *Rief*, 38 Am. Rep. 613.

Schultz v. *Mutual Life Ins. Co.*, 6 Fed. Rep. 672.

RAMSAY, J. (*diss.*):—

This is an action on a policy of insurance on the life of one Charlebois. There is a defence to the action turning upon the title of the appellant. It was not urged before us. The only question dwelt on was the right of respondent to repudiate the contract, because Charlebois contracted intemperate habits during the last year of his life, by which the risk was augmented, and that it was a condition of the contract this was to render the policy void.

The application for insurance sets forth that "It is "hereby agreed that this application shall form the basis "of the contract of insurance herein applied for, and the "same form part of said contract as if therein recited, and

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" that all answers and declarations contained in this ap-
" plication are and shall be taken to be strict warranties,
" and that "should the applicant become, as to habits, so
" far different from the condition in which he is represented
" to be as to increase the risk on the life insured * * *
" the policy shall become null and void, and the payments
" thereon shall be forfeited."

The policy which issued on this application provided that if " any of the declarations or statements made in the " application for this policy (upon the faith of which this " policy is issued) shall be found in any respect untrue " * * * the policy shall be null and void."

Appellant is very eloquent in denouncing the rigour of the terms of the policy, and shows clearly enough how such a clause might be made the pretext for very harassing litigation. This may be; but there is nothing in principle against a stipulation that the insured shall not act so as to increase the risk. It is an ordinary stipulation that a man shall not go into certain countries, nor become a soldier, nor fight a duel, and so forth, and I don't see why it may not be stipulated that he shall not contract intemperate habits, so as to increase the risk of the insurer. The real questions are, "Is the stipulation as rigorous as respondent contends; and is it proved that the insured *contracted* such habits as increased the risk?

On the first point there is no doubt that an undertaking for a consideration not to do a thing is a binding condition that you won't do it, and that if you do it, the other party shall not be obliged. It is not, however, a warranty, strictly speaking, and the application does not treat it as such.

Probably this would be of no practical importance, for the falsity of the warranty, and the non-fulfilment of the condition produce the same effect, according to the application.

Again, nothing can be plainer than the stipulation in the application that it shall form part of the policy, as if therein recited. Here, however, a difficulty presents itself. The policy does not repeat this, and it, and not the

application, is the contract. On the contrary, the policy seems to limit the generality of this clause, by saying that the contract shall be null if the statements or declarations in the policy be untrue. What is complained of, is not a declaration, neither is it a statement which may be true or untrue. It is a promise or undertaking not to do. This promise may be deceitful. It is possible, when making this promise, the insured may have determined to become a drunkard; but the *promise* is not *untrue*. Now, even if we were to say that the *successeur à titre général* of the insured was bound by the declaration in the application, that the clauses of the application were to form part of the contract, how can we hold the *cessionnaire à titre onéreux* to a clause of which he had no notice, and of which his title makes no mention?

On this point I am of opinion that the heir of the insured would not be bound, much less then the purchaser without notice.

Having arrived at this conclusion on the first point, it is perhaps unnecessary to examine the second question. I may, however, say, that I do not think it proved that the habits of the insured had become so intemperate as sensibly to augment the risk. The learned judge in the Court below has correctly observed, that to bring the case within the alleged condition, it was not necessary to show that the life of the insured had actually been shortened by intemperance; that it was sufficient to show that his habits increased the risk. Nevertheless, it is equally true that if the man's life was not shortened by his habits since the policy, as a matter of fact, the risk was not increased, and it is plain that the most satisfactory evidence that the deceased's habits had increased the risk would be that which showed his death was caused by intemperance. This, too, is the evidence the insurance company principally relies on. Johnson's evidence amounts to nothing. Leslie's is against the party producing him, Mme. Germain, who was married to Charlebois four months before his death, says: "Quelque fois il prenait de la boisson et il était souvent sous l'influence de la boisson, et ce n'était

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pas bon pour sa santé." All this does not mean very much, and without Dr. Hingston's testimony, there would be no case for the defendant at all worth considering. But Dr. Hingston's evidence goes to show that Charlebois died of dropsy; that dropsy resulted from a diseased state of the liver, that intemperance would create liver complaint, and that his impression was that the insured died from his intemperate habits. At best these are but shrewd guesses. It is not by an opinion of this kind that a company whose business is to deal in risks, can be permitted to shirk payment on a contract from which it quietly and without question, pocketed a revenue till called upon to pay.

Uncontradicted, perhaps, this evidence might raise a suspicion that Charlebois was a drunkard, and that this was the cause of his death, but it turns out that in August, 1881, from which time it is alone pretended he had contracted intemperate habits, he was found to be suffering from a very advanced heart disease; indeed, the malady was so developed, that an insurance company refused to let him take up a lapsed policy. One of the medical men called by appellant, was of opinion that a drink might be beneficial to a man suffering from heart disease. The idea is not new. A poet sings —

> It lays the careful head to rest,
> Calms palpitations in the *breast*."

Fortunately, we are not called upon in the case before us, to decide this knotty point; and we may safely leave it to the faculty to decide whether strong drink is a specific for *angina pectoris*. What we have to decide is whether the risk on the life of this man dying of heart disease, was materially changed by his taking, during a few of the last months of his life, a little more stimulant than he had done before. It seems to me that the position of the company is not favorable. They trump up a difficulty when they have to pay, which they never thought of when they were receiving money. Under these suspicious circumstances I think the evidence should be absolutely conclusive. To say the least, it is controverted. I am therefore, with my brother Baby, to reverse.

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CROSS, J.:—

This action is brought by James G. Boyce, assignee of a policy of insurance on the life of William Albert Charlebois, to recover $3,000, the amount insured by said policy.

The policy was effected by Charlebois on his own life on the 27th September, 1876, and by him transferred to Maria Eliza Helmina Bell, Mrs. Lefevre, who, by her attorney, transferred it to the appellant. Charlebois died 17th September, 1882.

The serious defence on which the case turns is raised by a plea based on a condition of the insurance, to the effect that if the assured became as to his habits so far different from the condition in which he was then as to increase the risk on his life, the policy would become void. That after the effecting of the insurance, Charlebois had become intemperate in his habits to an extent to increase the risk on his life, whereby the policy became void.

This condition was not expressly declared by the policy itself, but resulted from the written representations made by Charlebois in his application for insurance in a formula used by the company.

This application contained the following clause: "It is "hereby agreed that this application shall form the basis "of the contract of insurance herein applied for, and the "same shall form part of said contract as if therein recited, "and that all answers and declarations contained in this "application are and shall be taken to be strict warranties, "and that should the applicant become as to habits so far "different from the condition in which he is now represented to be as to increase the risk on the life insured, "the policy shall become null and void, and all payments "made thereon shall be forfeited." And in answers to questions contained in this form, Charlebois declared that his habits were temperate and sober, and that he was not then and had never been addicted to the use of any spirituous or malt liquors, opium or other narcotics.

Charlebois subjected himself to these conditions by his

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subscription to the application, and it was by the policy itself declared that it was issued on certain express conditions, one of which as therein set forth is: "If any of "the declarations or statements made in the application "for this policy (upon the faith of which this policy is "issued) shall be found to be in any respect untrue, then, "and in such case this policy shall be null and void."

I have no hesitation in saying that the contract thus formed was valid and became binding upon Charlebois and his assignees. It then becomes purely matter of evidence whether the alleged violation of the condition as to change of habits is proved.

The learned judge of the Superior Court who rendered the judgment appealed from, found it proved, and the majority of this court concur in the conclusion he arrived at.

It is to be observed that the question is not whether the life of Charlebois was really shortened by a change of his habits. The question is whether a change of his habits took place which in its nature increased the risk of his dying. The risk may have greatly increased and yet he may have died of a malady wholly unconnected with intemperance; yet the increase of risk in such case, by the terms of his contract, would have vitiated his policy.

The evidence of Dr. Hingston, Charlebois' medical attendant and family physician; of W. F. Johnson and of Charlebois' wife, Josephine Mondion, now Mrs. Germain, leaves no doubt in my mind that not only did Charlebois so change his habits after effecting the insurance in question as to increase the risk of his dying, but that his death was accelerated by his confirmed habits of intemperance, commencing from the death of his second wife, in the summer of 1881, and continuing up to the time of his own decease. Dr. Hingston says he was aware of his intemperate habits, and was of opinion that he died of disease of the liver, caused in a great measure by his habits of intemperance. He more than once urged Charlebois to be temperate, and is distinctly of opinion that the risk upon his life was materially increased by his intemperate habits.

Mrs. Germain, formerly his wife, speaking of the two last years of Charlebois' life, being asked: "Etait-il ivrogne d'habitude?" answers: "Il était souvent sous l'influence de la boisson." Q. "Et avez-vous eu occasion de lui reprocher ses habitudes d'intempérance?" A. "Oui." Q. "Pourquoi faisiez-vous des reproches à M. Charlebois?" A. "Parce que ce n'était pas bon pour sa santé."

An eminent judge, in a case resembling the present, remarked: "It is scarcely possible to imagine intemper-" ance not injurious to health."

It may be if Charlebois had not transferred the policy as early as October, 1876, he might, for the sake of his successors, have been more cautious in his conduct. Divesting himself of all interest, he did not require to consider how they would be affected by his death.

The majority of the Court are of opinion that the judgment appealed from is correct and should be confirmed, and they order accordingly.

Judgment of S. C. confirmed, Ramsay and Baby, JJ., dissenting.

Greenshields, *McCorkill*, *Guerin & Greenshields*, attorneys for appellant.

Maclaren, *Q.C.*, counsel.

Lafleur & Rielle, attorneys for respondent.

(N. T. R.)

June 30, 1886.

Coram MONK, TESSIER, CROSS, BABY, JJ.

HORACE FAIRBANKS ET AL.,
(*Plaintiffs below*),
APPELLANTS;

AND

BRADLEY BARLOW ET AL.,
(*Defendants below*),

AND

JAMES O'HALLORAN,
(*Intervenant below*),
RESPONDENTS.

Sale without delivery—Possession—Rights of creditors.

B., who was the principal proprietor of a railway company, was in the habit of mingling the moneys of the company with his own. He bought locomotives essential to the business of the railway company, and for several years allowed the company to have possession of the locomotives openly and publicly as though their own property.

HELD:—1. That the locomotives must be presumed to be the property of the company,—especially as regards creditors who had trusted the company on the faith of their possession of such property.

2. That the appellants, who claimed the locomotives under a sale from B. not accompanied by delivery, were not entitled to the property as against a *bona fide* creditor of the company.

The appeal was from a judgment of the Superior Court, Montreal (TORRANCE, J.), March 12, 1885, dismissing the appellants' action.

The judgment of the Superior Court was in these terms:—

"The Court, etc.....

"Considering that plaintiffs have failed to prove the proprietorship by them alleged in their declaration;

"Considering that the transaction with Barlow invoked by them was not a genuine but a simulated sale, and if at all real, was a contrivance intended to obtain, under

colour of a sale, a security upon the locomotives in question, and thus to avoid delivery of possession, which is essential to the validity of a pledge (*Cushing & Dupuy*, 5 App. cases, 409, and C. C. 1970);

" Considering that the intervener has established his right to intervene in the present case, doth grant the conclusions of said intervention and the several pleas of defendants, and dismiss the plaintiffs' action and *demande*, and doth annul and set aside the attachment made in said cause,—the whole with costs *distraits*, etc."

In rendering the above judgment Mr. Justice TORRANCE made the following observations:—

The action set forth that plaintiffs were proprietors of ten locomotives formerly belonging to defendant Barlow, which he sold to plaintiffs in consideration of their endorsing notes to the extent of $50,000, they agreeing to use the locomotives as collateral security, *i. e.* to return him any balance of proceeds of sale of locomotives after payment of their debt. The declaration alleged that the original agreement of sale was executed on the 16th January, 1883. The ten locomotives were therein stated to be of the make of the Rhode Island Locomotive Works, and were the only ones of that make belonging to Barlow. As the first notes were not paid at maturity, they were renewed by other notes aggregating the same amount, and at the same time, on the 10th May, 1883, the supplementary agreement was executed and in it the names of the locomotives were given in detail. The plaintiffs then alleged that the defendant Barlow absconded, leaving the locomotives in possession of defendant, the South Eastern Railway Company, in operation on their road. That plaintiffs had demanded delivery from the company before action brought, and having a right to possess them, they had taken a *saisie conservatoire*. That the other defendants, Redfield, Farwell and McIntyre were in apparent possession of the property of the company and also of the said locomotives (Barlow's property), styling themselves trustees under indentures of mortgage of the road. They were therefore put *en cause* as defendants.

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The plaintiffs then asked for the delivery of the locomotives, unless the defendants should pay the amount of their debt.

Barlow did not plead.

The South Eastern Railway Company pleaded a general denial, and secondly that the locomotives were the property of the Railway Company, who never authorized Barlow to pledge them, and that Barlow had acted only as manager of the company.

The trustees pleaded their status by virtue of a statute, and that all the property of the Railway Company had passed to them, including the locomotives. They also pleaded a general denial.

An intervention was also filed in September last by James O'Halloran, alleging that he was a judgment creditor, and that Barlow was notoriously insolvent at the time of making the agreements, and asking that the action be dismissed.

Plaintiffs contested the intervention on the ground of the perfect good faith of the transaction, and that Barlow was not insolvent until long after the date mentioned by intervener, and in any case the intervener's judgment was of subsequent date to the seizure in this case and could not affect it.

The plaintiffs claim under an alleged sale to them of date 16th January 1883, in the following words and figures: "Hon. Horace Fairbanks and Hon. Franklin Fair-
"banks having indorsed for my accommodation two
"notes of twenty thousand dollars each, one dated Jan-
"uary 1, 1883, and one dated 10th January, 1883, and
"payable in four months at the Bank of Montreal, and
"one note of ten thousand dollars, dated January 16,
"payable at the Bank of Montreal in three months from
"date.—Now, in consideration of the said endorsement
"I have this day sold to the said Horace and Franklin
"Fairbanks, ten locomotive engines of the make of the
"Rhode Island Locomotive Works, which I now own
"and which I agree to deliver to the said Horace and
"Franklin Fairbanks on demand, to be held by them as

" collateral security for the payment of said notes at ma-
" turity, and when said notes are paid the said ten loco-
" motives are to be re-delivered to me.

" (Signed,) BRADLEY BARLOW."

And under the following agreement, dated at St. Johnsbury, Vt., May 10, 1883 :—

" Whereas, as appears by my agreement of the 16th
" of January, 1883, Horace Fairbanks and Franklin Fair-
" banks endorsed for me certain notes to the amount of
" $50,000, described in an agreement signed by me, pledg-
" ing ten locomotives as collateral security for the pay-
" ment of said notes, the names of said locomotives now
" declared to be as follows: C. W. Foster, Bradley Bar-
" low, B. B. Smalley, L. Robinson, Longueuil, Newport,
" North Troy, A. B. Chaffee, Richford, and Farnham,—
" said locomotives to be held as collateral security for
" the payment of said notes or any renewals thereof—
" for value received.

" (Signed,) BRADLEY BARLOW."

After these agreements, the locomotives continued in the possession of Barlow.

The question here appears to me to be similar to the one decided by the Privy Council in *Cushing & Dupuy*. (1) It was there decided that the transaction was not a genuine but a simulated sale, and if at all real, was a contrivance intended to obtain, under colour of a sale, a security upon the plant and effects, and thus to avoid delivery of possession which is essential to the validity of a pledge. With this case before me, I must hold that the case of the plaintiffs fails. The action is dismissed, and the intervention is maintained.

May 28, 1886.]

Church, Q.C., and *A. D. Nicolls*, for appellants :—

The correlation of *Cushing & Dupuy* with this case is not real, except that both transactions purported to be a sale, but in *Cushing & Dupuy* there was wanting the essential of a price in money, or its equivalent in value. The price

(1) 5 App. cases, 409; 3 Leg. News, 171.

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stated on the face of it was, moreover, not serious,—"one dollar";—the responsibility assumed was contingent, not real, by the promise to endorse notes which might or might not be endorsed by him, and which, subsequently, might or might not be dishonored by the maker. The price for which the sale purported to be made was suspicious;—the lease for a sum which did not represent a reasonable return on the money claimed to be invested, was suggestive of a latent purpose; and the whole proceeding was anomalous. Here no such condition of things exists, or is even suggested by the litigants. No one denies that there was a price; nor that it was $50,000; nor affirms that the liability of the appellants was contingent and uncertain, nor that the proceeding was anomalous. It is manifest from the proof that the transaction was as follows: that, trusting Mr. Barlow, the appellants bought the engines in question, and, as the price thereof, endorsed and promised to retire Barlow's notes for $50,000; that, pending the delay which would elapse till the notes matured, they allowed the engines to remain in Barlow's possession; that it was only when circumstances made it desirable for the persons (Stephen *et al.*) who had already secured possession of all the balance of Barlow's estate under a rigorous deed of trust, to try and seize these also, that an effort was made to frustrate the appellants in their proceedings to be put in possession of their property.

O'Halloran, Q.C., for respondents.

CROSS, J. (for the court):—

By this action, the appellants Fairbanks and his partner sought to recover possession of ten locomotive engines which they alleged had been sold to them by Bradley Barlow, one of the respondents, to secure them against the endorsement of three promissory notes of the aggregate amount of fifty thousand dollars, endorsed at his request, and which had been renewed and the renewals taken up by them. The suit was accompanied by a seizure and was directed as well against Barlow as against the South Eastern Railway Company, and against Redfield,

Farwell and McIntyre, Trustees under a Statute of Quebec, 43 & 44 Vic. cap. 49.

The defendant Barlow made default. The South-Eastern Railway Company, by their plea, claimed the locomotives as their property, and denied having given Barlow any authority to sell or pledge them.

The Trustees pleaded their possession and ownership under the Statute of Quebec, 43 & 44 Vic. cap. 49, having in good faith received the locomotives from the South Eastern Railway Company.

The Railway Company pleaded that the locomotives belonged to them, and never were the property of Barlow, nor was he ever authorized to sell or pledge the same. The appellants produced the title under which they claimed, being a *sous seing privé* document dated 16th January, 1883, which declares that Barlow sold them the locomotives to guarantee them against an endorsement of his notes for $50,000.

After a certain amount of evidence had been taken on these issues, the respondent, James O'Halloran, intervened, alleging that he was a creditor of Barlow, denying any right whether of ownership or authority in Barlow, to pledge the locomotives, Barlow's insolvency long before the institution of the action, the non-delivery of the locomotives to the appellants, and a denial of appellants having any right to or lien or privilege on the locomotives, and his right as a creditor to have the pretended sale or pledge declared invalid. He concluded that the plaintiffs be declared to have no lien on the locomotives, and that their action should be dismissed.

The appellants contested the intervention, first by demurrer, which was dismissed.

Secondly, on the allegations that the transaction with Barlow was a sale by him to them in good faith, with the right of redemption in Barlow, who, when he so sold the locomotives, was the proprietor thereof, and was in good circumstances and credit, so that no fraud or preference was operated by the conveyance; that the non-delivery was due to the bad faith of the South Eastern Railway;

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that the intervening party one of its directors, was acting in collusion with the Company to defeat the rights of the appellants, who were entitled to seize the locomotives for the preservation of their rights as against the creditors of the Company, which was insolvent.

The proof was continued after the issue was joined on the intervention.

By the testimony of Barlow, who was examined in the case, it appears that he was principal owner of the South Eastern Railway, that he supported it by advances, and kept no distinct separate accounts. It is true that in his view of the matter, he had purchased the locomotives for himself with his own monies, but it is obvious it could have been only in name that the monies were his own in the manner he allowed his affairs to be mixed up with those of the Company. He had the control and management of the road where the locomotives were placed and used for years, without any agreement as to rent or revenue. The creditors of the road had a right to presume that the locomotives were owned by the road, which Barlow's own conduct warranted them in doing.

But whether the locomotives were owned by the Railroad Co. or by Barlow, it is obvious that as against a *bona fide* creditor of Barlow, the appellants could not pretend to hold them, and O'Halloran, having established his position as a judgment creditor of Barlow, who was insolvent, was entitled to the conclusions taken by his intervention.

As between the appellants and the Railway Company and Barlow, the matter might have been more susceptible of difficulty, because although the contract might only have amounted to a pledge, yet the pledgor might have been fairly bound to have delivered the pledge to his creditor, if no other interests intervened, and the question would thereby have been raised as to whether the Railway Company or their trustees had any legal quality or interest to oppose the execution of the contract between the pledgor and pledgee, where they had no title or interest in the subject matter in dispute. The view taken

of the evidence leads the Court to the conclusion that it was not in the right of Barlow or his assigns to maintain that the locomotives had belonged to him and not to the Company. He was drawing the company's money and placing it with his own. When he bought property essential to the Company, and placed it in the use and occupation of the Company and allowed them the possession of it openly and publicly as their property for years, it would be presumed to be their property, especially as regards creditors who had trusted the Company on the faith of the credit so given to them ; and when the trustees found this property in the possession of the Company, they had a right to presume that it really was their property and devolved upon them. Unless a valid title were shewn to the contrary, they became vested with the possession, forming a presumption of title in their favor, until the contrary could be shewn by any party putting forward a better title. This brings up a subject on which I think there has been misunderstanding and perhaps error, viz : that the consent of parties to a sale, completes the sale, without a delivery. The unqualified application of this principle, admitting its validity, may in some cases lead to a misconception as to its effects. True, the consent of the parties completes the sale and gives a good title to the vendee, but it is equally clear that a vendor who has given a good title by consent, may afterwards give a better title to another by consent and delivery. This was explained in my opinion transmitted to the Privy Council in the case of *Dupuy* v. *Cushing*, which I have regretted was omitted in the report of the case, because it has left unexplained the reason for my judgment in some other cases, taking for granted the views already declared in that case. ([1])

As regards the document of date the 16th January 1883, which Barlow executed in favor of the appellants, it is obvious that it does not make any evidence of a sale or that the transaction amounted to a sale. It was a mere pledge of the locomotives in security for the appellants'

([1]) For opinion of Cross, J. *vide* 8 Leg. News, p. 140.

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endorsement of notes for Barlow's accommodation,—a pledge that was wholly inoperative as against any party having an adverse interest in the absence of an effective delivery to and a lawful possession by the pledgee of the locomotives, the subject of the pledge.

The conclusion I deduce from the foregoing remarks is that the appellants have shewn no grievance entitling them to relief in any respect from the judgment they have appealed ; it must consequently be confirmed.

Judgment confirmed.

Church, Chapleau, Hall & Nicolls, attorneys for appellants.
J. O'Halloran, Q.C., attorney for respondents.
(J. K.)

June 30, 1886.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

AIMÉ LAMBERT,
(*Plaintiff in the Court below*),
APPELLANT;

AND

GILBERT SCOTT ET AL.
(*Defendants in Court below*),
RESPONDENTS.

Principal and Agent—Authority of Agent.

The purchaser of a car load of barley paid the price thereof to the vendor's agent, from whom he received the grain, and who was, moreover, named in the bill of lading as the consignee.

HELD :—That the bill of lading constituted a written authority to the consignee to control the consignment, and having delivered it, to receive the price; and his receipt was a valid discharge to the purchaser.

The appeal was from a judgment of the Superior Court, Montreal, (TORRANCE, J.) June 22, 1885, dismissing the appellant's action.

In rendering the judgment, the following observations were made :—

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TORRANCE, J. :—

The action was to recover from the well known brewers Wm. Dow & Co., the sum of $338.35, balance alleged to be due on a sale and delivery to defendants of two car loads or 1,000 bushels of barley at 67 cents per bushel. The defendants pleaded payment, and they had paid one Daignault, the consignee of the goods, and nephew of plaintiff. The question simply is whether the payment to Daignault should bind plaintiff. The facts are shortly these: The first car-load was delivered about the 13th November, 1884, and part payment made to the nephew, Daignault, in the office of defendants, and the nephew left without the balance, because there was at the moment no one in the office to sign the cheque. The clerk explained to the Court that the balance was paid by cheque to the order of Lambert, because it was sent to him by mail. The second car was consigned by plaintiff to his nephew, Daignault, by the Grand Trunk Railway for the convenience of delivery. Daignault delivered the barley in Montreal, was on the spot paid in a cheque to bearer, and never handed it over to plaintiff. Plaintiff complained that he had written a letter to defendants on the 21st November, requesting them to send him a cheque which they should have made payable to his order. Defendants answered that Daignault was the consignee of the goods; that the payment to him of a portion of the first car-load was not questioned; that being consignee, he had control of the goods; that payment by cheque to bearer in the city was usual, in consequence of the difficulty or inconvenience of identifying the payee of a cheque to order. Moreover, the payment to Daignault was fully authorized by C.C. 1739 and 1751.

The Court holds that the payment to Daignault of the cheque to bearer was in the ordinary course of business. Lambert placed confidence in Daignault by consigning the goods to his order, and payment to him was a good payment. *Vide* also *Clark* v. *Lomer*, 4 L. C. J. 30; *Johnson & Lomer*, 6 L. C. J. 77.

May 20, 1886.] *Hon. A. Lacoste, Q.C.*, for the appellant. *H. Abbott*, for the respondents.

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CROSS, J.:—

The appellant, by this action, claimed from the respondents $338.35, the price of a car-load of barley, which he alleges the respondents should pay, under the following circumstances:—

By a memorandum, dated 24th Oct., 1884, addressed to the respondents by the name of Messrs. William Dow & Co., the appellant declared that he had thereby sold and undertook to deliver to the said William Dow & Co., within fourteen days, two cars barley as per sample left with them, for sixty-seven cents per fifty pounds, to be delivered to them in their yard, they to supply the bags; that under the contract resulting from said memorandum. he had delivered to the respondents the two car loads of barley so contracted for, amounting in all to over 1,000 bushels, upon which there remained due $338.35, for which the action was brought.

The respondents pleaded that the transaction in question had been conducted through the intermediatory of one Daignault, who acted as the agent of appellant, and delivered the barley which, by the bills of lading, was consigned to him, Daignault. They paid Daignault for the barley, the last car-load being paid by cheque according to express request of the appellant, the cheque, according to custom, being made payable to bearer, and being delivered to Daignault, the consignee of the barley, and acting agent of the appellant.

The appellant answered that Daignault was only a carter, and as appellants well knew, made consignee, merely for the purpose of delivering the barley, and not as proprietor, which the appellants knew he was not.

It is admitted, and besides well proved, that Daignault, who is the nephew of the appellant, was the consignee named in the bill of lading. He is by occupation a master carter.

The Superior Court dismissed appellant's action on the ground that Daignault was made the consignee, and as such was the agent of the appellant.

I think the judgment was right, and should be con-

firmed. It is not enough for appellant to show that Daignault was only a carter, and that his name was inserted in the bill of lading as consignee, merely to facilitate the delivery. The bill of lading was a power of attorney for Daignault to control the consignment, and having delivered it, to receive the price. His power could not be limited by the testimony produced; his written authority could not thus be altered.

RAMSAY, J.:—

On the 24th Oct., 1884, at Montreal, appellant sold and agreed to deliver to respondents, within fourteen days, two cars of barley as per sample left with respondents, at the rate of 56c. per fifty pounds, to be delivered in respondents' yard, they furnishing the bags.

On the 13th November, appellant delivered, through one Daignault, 115 sacks of barley containing 540 bushels and 7 lbs., and respondents paid Daignault $4 for cartage, $207 cash, and the balance of $150 they sent by mail to appellant, by cheque, payable to appellant's order.

On the 21st November appellant sent the remainder of the grain by Daignault. In the meantime, appellant had written to respondents to send him the price by cheque. The respondents executed this commission by giving Daignault a cheque for the amount payable to bearer.

Daignault cashed the cheque and kept the money. Who is to be the loser? The question is not without difficulty. There is some confusion in the code as to the use of the words factor and agent. (*Crane et al. & Nolan*, 19 L. C. J. 309). But I don't think, within the definition of the Code, Daignault was a factor. He was, however, something more than a common carrier. The grain was consigned to him, and he had it and the document of title, by the will of the owner, which is a very marked distinction between this case and that of *Whitehead & Cassils et al., & Crawford et al.*, 21 L. C. J. 1. Under 1748 C. C. he could have pledged these goods. What he did was to get the price which was payable on delivery. The payment therefor

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was made to a person having legal possession of the goods in furtherance of a contract with the owner. Respondents did not trust Daignault further than appellant did. He might have stolen the wheat instead of the money. This seems to me to be conclusive, unless there was notice to respondents not to pay Daignault. Appellant contends that there was such notice. The letter speaks for itself, and respondents do not appear to have done otherwise than appellant desired. A recent case in England turns on a very similar point. A creditor wrote to his debtor to send him a cheque by mail. The debtor did so and the money was lost. Baron Huddleston held, that the debtor having paid as the creditor desired, the cheque was payment. So here, Daignault received the cash at the former delivery,—this payment was acknowledged, and respondents were asked to send cheque. They were not told to send it by mail. By what means were they to transmit it? It will be said, by Daignault, but by cheque to order. Then, why not say so, if they had the modified confidence in their emissary, that he would probably steal, but would not or could not forge. I am to confirm.

Judgment confirmed.

Lacoste, Globensky, Bisaillon & Brosseau, attorneys for appellant.

Abbott, Tait & Abbotts, attorneys for respondents.

(J. K.)

June 30, 1886.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

ISRAEL VINEBERG,
(*Defendant in Court below*),
APPELLANT;

AND

HOWARD RANSOM ET AL.,
(*Plaintiffs in Court below*),
RESPONDENTS.

Capias—Special bail under C. C. P. 824—*Statement and declaration under C. C. P.* 766—*Contempt—Commitment.*

HELD:—1. (Approving *Poulet* v. *Lauzière*, 6 Q. L. R. 314). That a defendant who has given special bail under C. C. P. 824, is not bound to file a statement and make the declaration mentioned in articles 764–766, C. C. P.

2. The defendant in this case, not being bound by law to file such statement, could not be in contempt for failing to do so.

3. A commitment for contempt until otherwise ordered by the Court is irregular: it should be for a specified time or until the person conforms to the order which he disobeyed.

The appeal was from a judgment of the Superior Court, Montreal, MATHIEU, J., ordering the appellant to file a statement and declaration as required by art. 766, C. C. P., and from a judgment subsequently rendered by TORRANCE, J., ordering the imprisonment of the appellant for contempt for not filing such statement and declaration. In delivering the latter judgment, Torrance, J., observed:—

"The demand here was for an order for imprisonment for contempt, against the defendants. They had been ordered by a judgment of 4 May, 1885, to file a sworn statement of their assets and liabilities in the terms of C. C. P., 764, 765, 766. The judgment was duly served as ordered, and the defendants failed to comply with its requirements. The Court would not here discuss *Carter & Molson*, but would merely say that the order having

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been disobeyed to produce the statement, C. C. 2273, the imprisonment would now be ordered as prayed for."

May 20.] *M. Hutchinson* and *J. S. Archibald* for the appellant.

D. Girouard, Q.C., for the respondents.

RAMSAY, J. :—

This case gives rise to a question of contempt to which the majority of the Court does not think it necessary now to allude. The commitment is during the pleasure of the Court. This is manifestly illegal. There is no authority at common law which entitles one man to imprison another during his pleasure. We express no opinion as to whether or when it is a contempt to disobey an order of a Court, or as to the similarity or difference between a so-called rule for contempt, and execution by way of *contrainte par corps*. The majority of the Court reverses the judgment simply on the ground that the commitment is illegal on its face.

CROSS, J. :—

The respondents Ransom *et al.*, sued out a writ of *capias* against the appellant Vineberg in April, 1884. Vineberg appeared and put in special bail under Art. 824 of the Code of Civil Procedure. He afterwards petitioned to quash the *capias*, but his petition was dismissed, the *capias* was confirmed, and the respondents had judgment for their claim.

On the 4th of March, 1885, the respondents presented a petition to the Superior Court, asking that the appellant should be ordered to file in the Prothonotary's office, a statement under oath, in accordance with the requirements of Arts. 764, 765 and 766 of the Code of Civil Procedure, within such time as the Court might fix, and in default of so doing that he should be declared to be in contempt of Court, and for such contempt be arrested and imprisoned and kept in custody of the keeper of the common gaol of the District of Montreal, until such time as the appellant should file such statement or for such other time as the Court might order.

The appellant pleaded that the bail given by him under Art. 824 of the Code of Civil Procedure, was to the effect that the sureties would become liable if the appellant should leave the heretofore Province of Canada, to wit, (Ontario and Quebec), without having paid the debt, interest and costs, for which the action was brought, said bail being what was formerly known as special bail to the action, the condition whereof was prescribed by the Statute 5 Geo. IV. c. 2, and no one arrested who had given such bail, could be legally called upon to make a declaration and abandonment of his property, such abandonment being for the relief of such debtors as could not give special bail. That said Art. 766 refers to the case of a debtor who has given bail to surrender himself in default of a right abandonment of his property, and not to the case of the defendant having given special bail.

The question thus raised has undergone judicial investigation, and as we think, correct decision in the case of *Poulet* v. *Launière*, reported in 6 Q. L. R. p. 314. It was there held that a defendant, who has given special bail, is not bound to file a statement and make the declaration mentioned in Art. 766 of the Code of Civil Procedure.

We have nothing to add to the reasons there given. This inevitably leads to the conclusion that the judgments appealed from should be reversed

The provisions of the Code of Civil Procedure are taken from the Statute 12 Vic. cap. 42, the object of which was to relieve debtors who could not give special bail as required by the Statute 5 Geo. IV., c. 2. A new description of bail was provided for those who should make the statement, and surrender their estates as directed by the 12 Vic., c. 42, but the right to give special bail and its consequences were left unimpaired.

If Vineberg was not bound to file the statement and make the declaration required by Art. 766, C.P.C., ordered by the judgment of the 4th of May, 1885, that judgment must be erroneous. It follows that the judgment of date the 30th June, 1885, based upon the previous order decreeing Vineberg to be in contempt of Court, and con-

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demning him to imprisonment, is also wrong, and both must be reversed, and the respondent's petition for *contrainte* dismissed, and it is so ordered.

The judgment of the Court is as follows:—

"The Court, etc.,

"Considering that Israel Vineberg, one of the defendants in this cause, now appellant, was arrested under a capias issued at the instance of the respondents, plaintiffs below, and gave bail under Art. 824 C.C.P., and inasmuch as by the judgment of the Superior Court, Montreal, June 30, 1885, the said Israel Vineberg was declared to be in contempt of Court for not having filed the statement required by C. C. P. 764, 765 and 766, which he had been previously ordered to do by judgment of the said Superior Court of 4th May, 1885, and was condemned by the said judgment of 30th June, 1885, to be imprisoned in the common gaol of the district of Montreal, and to be detained in such gaol until otherwise ordered by the said Court;

"And considering that a commitment for contempt must be for a given time, or until the person in contempt does or is willing to conform, and not generally and during pleasure;

"And considering that in the said judgment of 30th June, 1885, there is error;

"Doth quash the commitment of 30th June, 1885, with costs, as well in the Court below as in the Court here."

Judgment reversed.

Macmaster, Hutchinson & Weir, attorneys for appellant.

Girouard & McGibbon, attorneys for respondents.

(J. K.)

June 30, 1886.

Coram MONK, TESSIER, CROSS, BABY, JJ.

ANNA M. PATTISON ET VIR
(*Plaintiffs in Court below*),
APPELLANTS;

AND

MARY ELIZA FULLER ES QUAL.,
(*A defendant in Court below*),
RESPONDENT.

Will—Codicils—Construction of—Revocation of legacy.

H., who had $5,000 of stock in La Banque du Peuple, made a will, by which he bequeathed $1,000 of this stock to his granddaughter. Subsequently, he made three separate codicils, all bearing the same date, by one of which he bequeathed $3,000 of the said stock to the same granddaughter, and by the other two codicils he made specific bequests of $1,000 each of said stock for other objects,—thus disposing by the codicils of the entire sum of $5,000.

The question was whether the bequest by the first codicil of $3,000 to the granddaughter, under the circumstances stated, revoked the previous bequest in her favor, of $1,000, contained in the will.

HELD:—That the legacies contained in the codicils, disposing, as they did specifically, of all the stock which the testator had in La Banque du Peuple, operated a revocation of the first bequest of $1,000 to the granddaughter, contained in the will.

The appeal was from a judgment of the Court of Review, Montreal, April 30, 1885, (JOHNSON, TORRANCE, LORANGER, JJ.), reversing a judgment of the Superior Court, Montreal, January 17, 1885, TASCHEREAU, J.)

The *considérants* of the judgment in Review which was affirmed in appeal, were as follows:—

"The Court, etc.

"Considering that there is error in the judgment of 17th January last, doth reverse the same, and proceeding to render the judgment which should have been rendered by the Court below;

"Considering that the codicils pleaded by the defendant, Mary Eliza Fuller, had the effect of cancelling the bequest

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of $1,000 sought to be recovered by this action, doth dismiss the plaintiff's action with costs."

JOHNSON, J., who rendered the judgment of the Court of Review, made the following observations:—

"The plaintiff brought her action against the executrix of the late Abel Hurlburt, and also against the bank, to get $1,000 of bank stock, as bequeathed to her by his last will. The bank submitted itself to the judgment of the court, but the other defendant pleaded that there were codicils to the will; that by the first codicil (Oct. 11, 1883), the testator gave to the plaintiff $3,000 of the same stock for her use during her life; the property to be her children's after her decease; and that this codicil annulled the absolute bequest of $1,000, and was made in lieu of it. That by a second codicil, of the same date, the testator left $1,000 of stock to the poor of Frelighsburgh; and by a third codicil of the same date he left the dividends of $1,000 of stock to the Rev. J. B. Davidson, during his life, and to his successors in office after him. That the testator's stock in the bank amounted to $5,000, which was exactly disposed of by the codicils. The plaintiff answers that there was no express revocation of the bequest in the body of the will; but this is not necessary.

"By articles 892 and 894, the revocation may be either express or in consequence of incompatible posterior dispositions; and looking at this matter in the light of ordinary transactions and ordinary motives, it appears quite natural that the testator should have done what he did by the codicils, and dispose of all the stock he had in the bank in the way stated in the codicils. The judgment of the court below was for the plaintiff, but I am for reversing that and letting the codicils prevail; saving, of course, all the rights of the Rev. Mr. Davidson and his successors, not now in the case."

May 28.] *Butler*, and *Geoffrion*, Q.C., for the appellants *Tait*, Q.C., for the respondent.

CROSS, J. (for the Court):—

Abel Hurlburt had $5,000 of stock in the People's Bank.

He made a will, dated 8th July, 1881, by which he bequeathed $1,000 of this Bank stock to his granddaughter, Anna Maria Pattison, now wife of S. F. Haines, and the appellant in this cause.

On the 11th October, 1883, having then the same $5,000 stock in the People's Bank, he made three separate codicils all bearing the same date.

By one of said codicils he bequeathed to his said grand daughter "$3,000 of Bank stock which is in the People's Bank, in the City of Montreal," to be strictly entailed to the lawful heirs of her own body, she alone in her lifetime to have the right to draw the dividends.

By another of the said codicils he bequeathed to the suffering poor of Frelighsburg, the dividends on $1,000 of Bank stock which is in the People's Bank, in the City of Montreal, to the present and all future generations as entailed property, to be drawn and divided by the Rector of Frelighsburg, and his successors.

By a third of the said codicils he bequeathed to the said Rector and his successors, the dividends on $1,000, which is in the People's Bank, in the City of Montreal.

He died on the 18th October, 1883. His widow, Mary Eliza Fuller, was named executrix in the will.

The granddaughter, Mrs. Haines, now sues the executrix, claiming that she is entitled to two separate and independent legacies—the first of $1,000 of People's Bank stock, under the will, and the second of $3,000, under the codicil of the 11th October, 1883, and concludes for the delivery to her of the first legacy of $1,000 which the respondent Fuller refuses to concede to her. The People's Bank are put into the cause so as to be bound by the judgment.

The Superior Court awarded Mrs. Haines the conclusions of her demand, but in Review it was refused, and her action for the legacy of $1,000 was dismissed.

The question raised is whether the appellant, Anna Maria Pattison, is entitled to two legacies of People's Bank stock, one of $1,000, under the will of the 8th July, 1881, and the other of $3,000, under the codicil in her favor of the 11th October, 1883.

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The People's Bank do not contest, but submit themselves to the decision of the Court.

The leading principle to guide the Courts in such cases is, to judge from the context of the testamentary documents of the intention of the testator. I think the Superior Court in Review adopted the correct view of the case in holding that the legacies contained in the codicils, disposing as they did specifically, of all the Bank stock the testator had in the People's Bank, operated a revocation of the first bequest of $1,000 of the same in favor of the testator's granddaughter, Mrs. Haines. He appears to have been possessed altogether of $5,000 of Bank stock in the People's Bank, in the City of Montreal, which he held at the time he made his will on the 8th of July, 1881, and continued to hold when he made the codicils of date the 11th October, 1883, and up to the time of his decease. The bequests are so worded as to imply that they are to be taken out of this $5,000 of Bank stock; when, therefore, on the 11th October, 1883, he, by his codicils, disposed of the whole of this $5,000 of Bank stock, he did not intend that a previous bequest of $1,000 of the same Bank stock should remain in force. The last disposition of it must therefore, be construed as a revocation of the first. This inevitably leads to the conclusion that the judgment appealed from must be confirmed.

Judgment of Court of Review confirmed.

Butler & Lighthall, attorneys for appellants.

Abbott, Tait & Abbotts, attorneys for respondent M. E. Fuller.

(J. K.)

June 30, 1886.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

WILLIAM F. LEWIS ET AL.
(*Defendant in Court below*),
APPELLANTS;

AND

FRANCIS P. OSBORN,
(*Plaintiff in Court below*),
RESPONDENT.

Partnership—Responsibility for acts of person managing business carried on by appellants under a different name.

The appellants set up a firm of "J. H. Wilkins & Co.", which was in reality their own business, with J. H. Wilkins as manager, but to the public the business was that of "J. H. Wilkins & Co." This firm bought goods from respondent, the price of which was claimed by the present action.

HELD:—That the appellants were liable for the obligations of the firm of J. H. Wilkins & Co., and for the acts of J. H. Wilkins who was entrusted with the management.

The appeal was from a judgment of the Superior Court, Montreal, (MATHIEU, J.), Feb. 19, 1885, maintaining the respondent's action.

The principal question was as to the responsibility of the appellants for the acts of one John H. Wilkins, manager of the firm of J. H. Wilkins & Co., composed of the appellants, but not registered as their business, the appellants at the time carrying on business under the firm of W. F. Lewis & Co.

The judgment of the court below, which was affirmed in appeal, was as follows:—

"La cour, etc.

"Attendu qu'il a été prouvé que le 30ième jour de juin 1880, par acte sous seing-privé, les défendeurs et John Henry Wilkins déclarèrent qu'ils allaient ouvrir un magasin, à Montréal, sous le nom de "J. H. Wilkins & Cie." pour être administré par le dit John Henry Wilkins, pour

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eux, comme leur agent et gérant, aux conditions suivantes : que les défendeurs fourniraient les marchandises au prix coûtant et chargeraient une commission de cinq pour cent pour les marchandises achetées par les défendeurs et chargeraient un prix à être convenu entre les parties, pour les marchandises que fourniraient les défendeurs, sur leur fonds de commerce : qu'aucun achat ne pourrait être fait par Wilkins et qu'aucune vente ne serait faite à crédit ; que tous billets recevables seraient déposés entre les mains des défendeurs pour être placés au crédit de J. H. Wilkins & Cie. ; que les profits seraient partagés également entre les parties au dit écrit, mais qu'ils ne seraient pas associés, et que cette convention fut faite pour une année ; que cette convention fut mise à exécution et qu'un magasin fut ouvert, tel que convenu, et les affaires faites sous le nom de J. H. Wilkins & Cie., par le dit John H. Wilkins jusqu'au mois de juillet 1883 : que dans le cours des mois de mai, juin, juillet, août et septembre 1883, les défendeurs se sont endettés envers le demandeur en une somme de $462.10, pour des effets de commerce à eux vendus par le demandeur, lequel montant le demandeur a réclamé par son action en cette cause ; que le 9 avril 1883, J. H. Wilkins & Cie. tirèrent une lettre de change, datée à Montréal sur W. C. Rogers, de New York, le requérant de payer à l'ordre de J. H. Wilkins & Cie., à New York, $457.58, laquelle traite fut accepté par le dit Rogers, payable à la "Tradesmen's National Bank" à New York ; que cette traite ne fut pas payée à son échéance, mais fut protestée le 12 octobre 1883 ; que, dans le mois de juillet 1883, W. C. Rogers, étant devenu insolvable, proposa à ses créanciers un concordat que les défendeurs ne voulaient pas accepter, pour le montant de leur créance résultant de la dite traite et que le 25 juillet 1883, le demandeur, dans le but de favoriser W. C. Rogers, et de lui faire obtenir un concordat, écrivit une lettre aux défendeurs, sous le nom de J. H. Wilkins & Cie., par laquelle il leur garantit le paiement de la dite traite, à son échéance, le 12 octobre 1883, pourvu que les défendeurs lui transportassent leur réclamation contre Rogers et télégraphissent

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au dit Rogers, le même jour à New York, qu'ils acceptaient son concordat, et pourvu qu'ils remissent au demandeur les billets de composition à quarante centins dans la piastre, de Rogers aussitôt qu'ils les auraient reçus : que le 9 avril 1883, Rogers ayant effectué un concordat avec ses créanciers à quarante centins dans la piastre écrivit aux défendeurs sous le nom de J. H. Wilkins & Cie., à Montréal, les informant qu'il continuait ses affaires et leur demandant de lui renvoyer les trois billets de composition, et promettant que la traite qui devenait due le 12 d'octobre 1883, serait payée à son échéance, et remarquant que cette traite était garantie : que les défendeurs sur réception de cette lettre transmirent le 11 août 1883, à Rogers, à New York, les trois billets de composition ci-dessus mentionnés, du montant de $61.01 chacun, lesquels furent reçus à New York par le dit Rogers : que le 19 janvier 1883, le demandeur escompta et devint porteur, par l'entremise du dit John Henry Wilkins, un billet daté à Québec, le 19 décembre 1882, et signé par " Gingras & Langlois " payable à trois mois de date, à l'ordre de J. H. Wilkins & Cie., au bureau de la banque Union du Bas-Canada, pour la somme de $102.33, endossé par J. H. Wilkins & Cie., et qui est devenu dû le 22 mars 1883, et qu'il fut protesté, à son échéance, faute de paiement : que le 6 février 1883, le dit John Henry Wilkins, qui faisait alors des affaires comme susdit, se rendit à la place d'affaires du demandeur, en la cité de Montréal, et demanda à emprunter $135 pour payer des droits de douane, il obtint cette somme du demandeur par un chèque daté du 6 février 1883, payable à l'ordre de J. H. Wilkins & Cie., pour le montant de $135 sur la banque de Commerce du Canada, lequel chèque fut endossé par J. H. Wilkins & Cie., et payé par la banque ;

" Attendu que le demandeur réclame des défendeurs, comme susdit par son action qui a été signifiée aux défendeurs le 30 janvier 1884, la dite somme de $462.10 ;

" Attendu que les défendeurs, par leur plaidoyer, offrent en compensation du montant réclamé par le demandeur, le montant à eux dû par le demandeur pour les traites du

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9 d'avril 1883, garantie par le demandeur, comme susdit, qui s'élevait le 30 janvier 1884, lors de l'assignation en cette cause, à la somme de $467.84 en capital, frais de protêt et intérêt jusqu'alors ;

" Attendu que le demandeur a répondu au plaidoyer des défendeurs que ces derniers ne s'étaient pas conformés aux conditions de sa lettre du 25 juillet 1883, et qu'ils n'avaient remis au demandeur aucun billet de composition de Rogers mais avaient remis les billets à Rogers lui-même, et dans le cas où il serait considéré que le demandeur doit aux défendeurs le montant de la dite traite, il offre en compensation le montant des trois billets de composition que les défendeurs devaient lui remettre, comme susdit, et qui s'élevaient à $183.03, ainsi que la somme de $105.37, montant en capital et frais de protêt du dit billet de "Gingras & Langlois" du 19 décembre 1882, avec intérêt à compter du 22 mars 1883, et la somme de $135, montant du dit chèque du 6 février 1883 ;

" Attendu que le demandeur dans une autre réponse au plaidoyer des défendeurs, allègue qu'il n'avait fait que garantir le paiement de la dite traite, et que les défendeurs, en remettant au dit Rogers les dits billets de composition, ont fait avec lui de nouvelles conventions qui ont eu pour effet de décharger le demandeur de la dite garantie ;

" Attendu que les défendeurs dans leur réplique spéciale à la première réponse du demandeur allèguent que le dit John Henry Wilkins n'était pas autorisé à emprunter la dite somme de $135, montant du chèque du 6 février 1883, et à escompter le billet de "Gingras & Langlois," et que les défendeurs n'ont jamais eu le bénéfice de ces transactions qui étaient des affaires personnelles du dit John Henry Wilkins avec le demandeur sous la seule responsabilité du dit John Henry Wilkins, les affaires que faisait le dit John Henry Wilkins étant pour le compte des défendeurs seuls, ce que connaissait le demandeur, que les billets de composition ont été remis à Rogers du consentement du demandeur qui s'est obligé à payer des dettes de Rogers ;

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" Considérant que les défendeurs sont les porteurs de la traite du 9 avril 1883 qui est devenue dû le 12 octobre 1883 ;

" Considérant que le demandeur s'est, par sa lettre du 25 juillet 1883, obligé envers J. H. Wilkins & Cie., de payer cette traite et que J. H. Wilkins & Cie. agissaient alors pour les défendeurs et les représentaient, et que l'obligation contractée par le demandeur dans la lettre du 25 juillet 1883, doit profiter aux défendeurs qui réclament le bénéfice de l'obligation contenue dans cette lettre ;

" Considérant que la remise des dits billets de composition faite par les défendeurs au dit Rogers n'a pas eu pour effet de libérer le demandeur de l'obligation qu'il avait contractée par la dite lettre du 25 juillet 1883, vu que le but du demandeur en demandant la remise de ces billets de composition était de se faire payer le montant par le dit Rogers, et que cette remise ne peut avoir pour effet que de rendre les défendeurs responsables du montant des dits billets de composition vis-à-vis du demandeur ;

" Considérant que les défendeurs ont remis au dit Rogers les dits billets de composition sans l'autorisation du demandeur et en contravention à la dite lettre du 25 juillet 1883 ;

" Considérant que la remise du titre, c'est-à-dire des dits billets de composition pourrait être considéré comme une remise de la créance et que cette remise, quoiqu'elle s'explique facilement par les faits prouvés en cette cause, pourrait empêcher le demandeur de recouvrer le montant de ces billets de composition du dit Rogers, ou du moins pourrait lui rendre plus difficile la collection de ce montant ;

" Considérant que, sous les circonstances prouvées dans la cause, il est juste que les défendeurs portent seuls la responsabilité résultant de la trop grande confiance qu'ils ont eue en Rogers en lui remettant les dits billets de composition sans le consentement du demandeur, et qu'ils doivent tenir compte au demandeur du montant des dits

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billets de composition, en déduction du montant de la dite traite du 9 avril 1883 ;

" Considérant que le dit John Henry Wilkins était considéré dans le public, comme associé des défendeurs et que, vis-à-vis des tiers, il était suffisamment autorisé à faire les transactions qu'il a faites avec le demandeur et notamment à escompter le billet du dit 9 décembre 1882 de " Gingras & Langlois " et à emprunter la somme de $135, montant du chèque du 6 février 1883 ;

" Considérant d'ailleurs que ce transport du billet de " Gingras & Langlois " et cet emprunt d'argent ont été faits par J. H. Wilkins & Cie., et que c'est à John H. Wilkins & Cie., que le demandeur a garanti la traite du 9 avril 1883, et qu'il est juste que le demandeur puisse déduire d'une dette due à J. H. Wilkins & Cie., et que les défendeurs réclament le montant des créances résultant des dits transactions qu'il a contre J. H. Wilkins & Cie., et que les défendeurs ne peuvent réclamer des dettes actives de J. H. Wilkins & Cie., sans se charger des dettes passives ;

" Considérant que sous les circonstances prouvées en cette cause, les défendeurs ont le droit d'opposer au demandeur en compensation de sa créance le montant de la dite traite du 9 avril 1883, moins le montant des dits billets de composition, le montant du billet de " Gingras & Langlois " et le montant du chèque du 6 février 1883;

" Considérant que le 12 octobre 1883, le demandeur était créancier des défendeurs pour le montant de sa demande en cette cause, $462.10, et qu'il était en même temps débiteur de ces derniers pour le montant de la dite traite du 9 avril 1883, au montant de $457.58, plus les frais de protêt, $1.33, formant une somme totale de $458.91, moins toutefois une somme de $135, montant du chèque du 6 février 1883, celle de $102.23 montant du billet de " Gingras & Langlois " du dit 19 décembre 1882, payable le 22 mars 1883, plus le coût du protêt du dit billet, $3.13. et les intérêts sur le montant capital du dit billet à compter du 22 mars 1883, jusqu'à la même date, $3.40, et la somme de $183.03, montant des trois billets de compo-

sition de Rogers, remis comme susdit, formant en tout une somme totale de $426.89, à déduire de celle de $458.91, laissant une balance de $32 que les défendeurs avaient droit d'opposer en compensation à la créance du demandeur, laissant une balance de $430.08 revenant au demandeur ;

" Considérant que la défense des défendeurs est bien fondée jusqu'à concurrence de la dite somme de $32.02, mais qu'elle est mal fondée pour le surplus, et que l'action du demandeur est bien fondée pour la dite somme de $430.08, mais qu'elle est mal fondée pour le surplus ;

" A maintenu et maintient la défense des défendeurs jusqu'à concurrence de la dite somme de $32.02, et la renvoie pour le surplus, et a maintenu et maintient l'action du demandeur, jusqu'à concurrence de la dite somme de $430.08, etc."

May 19.] *H. Abbott*, for the appellants.

L. N. Benjamin, for the respondent.

CROSS, J. :—

The judgment in this case should be confirmed for the reasons mentioned in it. The appellants set up a firm under the name of J. H. Wilkins & Co. By private agreement it was their own affair, but to the public, the business was that of J. H. Wilkins & Co. They bought goods from the respondent, and failing to pay for them, he sued. In defence they set up a guarantee letter which the respondent had given to J. H. Wilkins & Co., for a debt due appellants by one Rogers of New York. Respondent replied, saying that the condition of the guarantee letter had been violated, and the letter did not, therefore, bind him, as the appellants had surrendered to Rogers the composition notes which they were to have delivered over to respondent, besides which, J. H. Wilkins & Co. owed him two sums, one for a note of Langlois, of Quebec, endorsed by them, and another for money lent to pay duties.

Appellants replied that J. H. Wilkins & Co. were not authorized to incur these debts. I am of opinion that they could not avail themselves of the claims and assets of J.H.

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Wilkins & Co., unless subject to their liabilities. The judgment is confirmed.

RAMSAY, J.:—

At first sight this case looks more formidable than it really is. Respondent sued appellants, who carry on business under the name of W.F. Lewis & Co., for $462.10 for goods sold and delivered. Appellants met the action by saying, "it is true we owed you this sum, but we are the firm of J. H. Wilkins & Co., and you are indebted to that firm in the sum of $457.58, amount of draft you guaranteed to pay if the acceptor, Rogers, did not pay, on production of his (Rogers) promissory note, and the delivery to us (Osborn & Sons) of his composition notes when received. It is true, Wilkins & Co. got the composition notes from Rogers, but putting faith in a statement of Rogers that he would pay the draft, Wilkins & Co. sent back the composition notes to Rogers. But this does not signify, for you the respondent, are in Rogers' place."

We have been told with much earnestness that there is no evidence that appellants are J. H. Wilkins & Co. I cannot see what it matters to Osborn whether they are or not. If he promised to guarantee the payment of the draft, it signifies not to him in whose hands the draft is, unless he has some equity to set up against Wilkins & Co. But there is a difficulty of some magnitude in appellant's way at this point. Avowedly, they did not return the composition notes to Osborn, unless they have proved that Rogers was Osborn. Is there any proof of this?

The evidence of Osborn on the *commission rogatoire* is very wild, but I don't think it bears out the pretention of appellants that it signified nothing whether he got the composition notes or not. It is evident that if he doesn't get them, he has no claim against Rogers. What he, in fact, says, amounts to this: "I don't mean to repudiate the guarantee. I can't say whether I shall suffer or not by not having the composition notes. I fancy Rogers would pay me the composition. I have not suffered as yet, because Rogers has not paid the composition and I have not paid the draft."

If this were got over, there would still be the set-off against appellants' set-off of all that Osborn had paid to Wilkins in good faith. Appellants say, you can't add to your declaration by special answer. That doctrine is not true in the sense appellants attach to it. The doctrine is this, you can't add to your demand; but no one ever said one could not avoid the plea by special answer. Otherwise pleadings would be closed and issue joined by the declaration, plea and general issue. The ordinance does not say that.

This compensation of the alleged compensation amounts to this: if Lewis & Co., and Wilkins & Co., are identical, respondent can answer to Lewis & Co., that which he could answer to Wilkins & Co. The rule must work both ways. That being the case, the indebtedness of Wilkins & Co. to respondent is fully established. The only item seriously contested is the advance to J. H. Wilkins for the firm of which he appeared to be a partner. It is appellants' own fault if they left this matter to be judged of by appearances.

If the judgment appealed from is bad, it is not the appellants who have to complain. I am to confirm.

Judgment confirmed.

Abbott, Tait & Abbotts, attorneys for appellants.

L. N. Benjamin, attorney for respondent.

(J. K.)

January 27, 1886.

Coram DORION, CH. J., MONK, RAMSAY, CROSS, BABY, JJ.

WILFRED E. BRUNET,

(*Petitioner in Court below*),

APPELLANT;

AND

L'ASSOCIATION PHARMACEUTIQUE DE LA PROVINCE DE QUÉBEC,

(*Respondent in Court below*),

RESPONDENT.

Quebec Pharmacy Act, 48 *Vict.* (*Q.*), *ch.* 36, *s.* 8—*Construction of—Partnership contrary to law.*

HELD:—(Reversing the judgment in Review, M. L. R., 1 S. C. 485,) That the appellant, who had, during more than five years before the coming into force of the Act 48 Vict. (Q.) ch. 36, practised as chemist and druggist in partnership with his brother, and in his brother's name, was entitled, under sect. 8 of the Act, to be registered as a licentiate of pharmacy. The section in question must be construed as applying to those who have *illegally* practised as chemists and druggists, and it was immaterial whether the appellant had practised in his own name or in a partnership contrary to law,—the illegality in either case being covered by the Act.

The appeal was from a judgment of the Court of Review, Montreal, reversing a judgment of the Superior Court, Montreal. The judgment of the Court of Review is reported in M. L. R., 1 S. C. 485.

The case turned upon the construction of sect. 8 of the Act 48 Vict. (Q.) ch. 36.

Jan. 20.] *Geoffrion*, *Q.C.*, and *Corriveau* for the appellant:—

The Act of 1885 manifestly refers to illegal partnerships. It was intended to give certain persons a right to a license; it refers, therefore, to those who had no license. Those who had no license could not, under the law of 1875, legally practise as pharmacists, and the partnerships which they formed with this object were

illegal. If the Act of 1885 does not refer to illegal partnerships it would have no meaning whatever. It is submitted that the intention of the Act is so clear as to leave no room for a different interpretation.

J. L. Archambault, Q.C., for the respondent :—

Section 8 of the Act of 1885 should not have a more extensive meaning than section 3 of the Act of 1875, which it replaced, and it does not entitle those to be admitted *de plano* who, under the Act of 1875, would have had to undergo an examination. In the next place, the appellant as a certified apprentice is not entitled to the benefit of the Act of 1885 without following the ordinary course. Thirdly, the pretended practice as pharmacist set up by the appellant, as the partner of his brother, being illegal under the Act of 1875, cannot produce any effect. The judgment of the majority of the Court of Review adopted this view, and it is sustained by the authorities cited.

DORION, Ch. J., for the Court, held that the appellant was entitled to the benefit of section 8 of the Act of 1885. The reasons are sufficiently set forth in the written judgment of the Court, which is in the following terms :—

"La cour, etc. . .

"Considérant que l'appelant a, pendant plus de cinq ans avant la mise en vigueur de l'acte 48 Vict. (Q.) ch. 36 (1885), exercé dans la province de Québec, savoir, à Saint-Sauveur de Québec, la profession de chimiste, droguiste et apothicaire, tant pour son propre compte qu'en société avec Ovide Etienne Brunet, son frère décédé;

"Et considérant que l'appelant a produit au Régistraire de l'Association Pharmaceutique de la Province de Québec, intimée en cette cause, dans les douze mois de la passation de cette loi, la preuve qu'il a exercé la profession de chimiste, droguiste et apothicaire pendant plus de cinq ans avant la passation de cette loi;

"Et considérant que l'appelant a, par là, acquis le droit en vertu de la section 8 du dit acte, de se faire inscrire comme licencié en pharmacie, conformément aux dispo-

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sitions du dit acte, ce que l'Association intimée a refusé de faire ;

"Et considérant que cette section 8 du dit acte ne peut s'appliquer qu'à ceux qui ont sans droit et illégalement exercé la profession de chimiste, droguiste et apothicaire, et que dès lors il est indifférent que l'appelant ait exercé cette profession en son propre nom ou en vertu d'une société prohibée par la loi, ayant dans l'un ou l'autre cas exercé sans droit et illégalement la dite profession ;

"Et considérant qu'il y a erreur dans le jugement rendu par trois juges de la Cour Supérieure, siégeant en Révision à Montréal, le 31 octobre 1885 ;

"Cette Cour casse et annule le dit jugement du 31 octobre 1885, et confirmant le jugement rendu en première instance par la Cour Supérieure, le 22 juillet 1885, ordonne qu'il émane un bref de *mandamus* péremptoire, enjoignant à la défenderesse intimée d'inscrire l'appelant comme licencié en pharmacie, conformément à la dite loi de pharmacie de Québec, sous le délai de quinze jours, à compter de la signification du présent jugement, et à défaut par la dite défenderesse intimée de ce faire sous le dit délai, a condamné et condamne la dite défenderesse intimée au paiement d'une amende de $2,000, à être prélevée suivant la loi, et a condamné et condamne la dite défenderesse intimée aux dépens encourus tant en cour de première instance qu'en révision et sur le présent appel."

Judgment reversed. (1)

Corriveau & Paré, attorneys for appellant.

Archambault, Lynch, Bergeron & Migneault, attorneys for respondent.

(J. K.)

(1) Leave to appeal to the Supreme Court of Canada was granted.

January 25, 1886.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

EUGENE M. COPELAND,
(*Defendant in Court below*),
APPELLANT;

AND

NORBERT LECLERC,
(*Plaintiff in Court below*),
RESPONDENT.

Illegal arrest and imprisonment—Probable cause—Complaint dismissed for defect of jurisdiction.

HELD:—1. Where the respondent converted to his own use certain straw bought by him with money furnished to him by the appellant and intended for the appellant's benefit, that there was probable cause for his arrest.

2. Where a person lays an information before a justice of the Peace, that a crime has been committed for which such justice has general jurisdiction, and the justice grants a warrant upon which the accused is arrested, but he is afterwards discharged upon the ground that the justice had no authority in that special case, the complainant, if he had probable cause, is not liable in damages for illegal arrest and imprisonment.

The appeal was from a judgment of the Court of Review, Montreal, Sept. 30, 1882, condemning the appellant to pay the respondent the sum of $100 damages for illegal arrest and imprisonment. The judgment of the Court below is reported in 5 Legal News, 340.

The action was instituted before the Superior Court for the district of Richelieu, by the respondent, against the appellant and one Gundlack, to recover damages for slander, and false arrest and imprisonment. The Superior Court, Taschereau, J., dismissed the action with costs. The respondent took the case to Review, and there the first judgment was maintained so far as the dismissal for slander was concerned, but the judgment as regards the false arrest and imprisonment was reversed, and the sum

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of $100 damages was awarded. The observations of Mr. Justice Mackay, who pronounced the judgment, will be found in full, in 5 Legal News, pp. 340-2. The written judgment of the Court of Review is as follows :—

" The Court, etc.,

" Considering that by the final judgment of the Court below, the action of the plaintiff was not improperly found not maintainable as an action for verbal slander ;

" But considering that plaintiff's demand in the Court below was compound, and considering that the plaintiff, of Contrecœur, in the District of Montreal, was illegally arrested at Contrecœur, in January, 1881, upon a criminal charge preferred by the defendant Copeland, against him, before a Justice of the Peace, for the district of Richelieu, and that plaintiff afterwards suffered imprisonment in consequence, until freed as hereinafter stated ;

" Considering that the warrant of arrest was illegal, *ultra vires*, and involved a trespass by a Justice of the Peace who issued it, and the execution of it at Contrecœur, district of Montreal, by the constable of the district of Richelieu, was a trespass ;

" Considering that the plaintiff has been duly freed from said arrest for want of jurisdiction in the Justice who issued the warrant for it ;

" Considering that the said making of criminal charge by Copeland against plaintiff, and the said arrest and imprisonment were unjust, illegal, and without reasonable or probable cause and malicious, and that plaintiff has been damaged by them, and that he, Copeland, is responsible in consequence, having been the chief mover in all that was done ;

" Considering that in the judgment complained of, holding to the contrary and dismissing plaintiff's action as regards Copeland, there is error ;

" Considering that no justification has been shown or proven by Copeland, and that plaintiff's action cannot be held barred by anything proved ;

" Doth *cass*, annul and reverse the said judgment as regards Copeland, and proceeding to render the judgment that should have been rendered by the Court below ;

"Doth condemn the said defendant Copeland to pay to plaintiff the sum of one hundred dollars, to compensate for all damages real and nominal, for the illegal arrest and imprisonment of plaintiff, with interest thereon from this day, and costs, as in an action of the lowest class in the Superior Court, such costs to include those of all the witnesses and depositions produced and examined for the defendants conjointly, and costs of review against him, Copeland, distraits, etc.;

"And as regards the judgment appealed from, in so far as regards Gundlack, the said judgment is held to call for modification, and this Court, rendering the judgment that ought to have been rendered as between plaintiff and Gundlack, confirms the said judgment, in so far as dismissing the action as regards him, Gundlack, but orders such dismissal to be and read with costs to said Gundlack, save costs of so much of the enquête in the Superior Court, as Copeland by this judgment has been and is condemned to pay, the Court intending that he, Gundlack, may tax against the plaintiff the costs of the witnesses examined expressly for him upon his separate pleadings, to wit, Copeland, Larochelle and Dudley, and without costs of review against him, Gundlack."

Nov. 26, 1885.] *W. H. Kerr, Q.C.*, for the appellant:—

The allegations of the declaration are to the following effect:—That on the 29th January, 1881, at Sorel, in the district of Richelieu, the defendants in the original action conspired together maliciously, without reasonable or probable cause, and made a certain complaint under oath and signature of the present appellant before William Lunan, Esq., a Justice of the Peace, for the said district of Richelieu, accusing the said respondent of having illegally and with intent to defraud, converted to his own use and benefit certain straw bought by the said respondent with monies furnished to him by the present appellant and intended for his, the said appellant's benefit. That, thereupon, the said Lunan issued his warrant addressed in the usual form to the constables of the said district of Richelieu, ordering them to bring before him or any other

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of the Justices of the Peace of Her Majesty, the said respondent to answer to the said complaint. That, thereupon, Charles Weilbrenner, High Constable for the said district of Richelieu, at the request of the said appellant, did arrest the said respondent and keep him from the 30th January, 1881, to 31st of the same month, when he appeared before a magistrate for the district of Richelieu, and gave security for his appearance for the 2nd of February then next. That on the 2nd of February, the respondent appeared before Adolphe Bruneau, another of the Justices of the Peace, for the said district, and the case was then adjourned until the afternoon when Louis Z. Gauthier, another of the Justices of the Peace of the said district, dismissed the same for want of jurisdiction. Then followed a statement of the costs which the present respondent was obliged to pay in consequence of his illegal arrest. Next followed an allegation of verbal slander, and that on account of the premises, the respondent suffered damages to the extent of $1000, for which he prayed judgment.

To this action the appellant pleaded: 1st. A *défense en fait*. 2d. A plea virtually setting up reasonable and probable cause, and that respondent never suffered any damage.

The parties went to proof and the examination of witnesses was conducted at a length peculiar to the district of Richelieu,—the stenographer's fees alone amounting to a very large sum of money. The real point in the case was one that was not noticed by the Court of Review in its judgment, and it is the following;—

The complaint of the appellant showed in the most conclusive manner that the respondent was not within the jurisdiction of the Magistrate before whom that complaint was laid. It is alleged therein in the most direct terms that the offence committed, was so committed in the Parish of Contrecœur, in the district of Montreal, and further, it was not alleged in the said complaint that said respondent was then in the district of Richelieu. Such being the case, it was the duty of the Justice of the Peace to refuse to issue the warrant for the apprehension of the respondent.

The appellant cannot be blamed for the usurpation of power by the Justice of the Peace.

The principle may be embodied in the following words: —Where a person lays an information before a Justice of the Peace, that a crime has been committed for which such Justice has general jurisdiction, and such Justice grants a warrant upon which the party accused is arrested, but he is afterwards discharged upon the ground that the Justice had no authority in that special case, the complainant is not liable.

Addison on Torts, pp. 571, 573, 719, and cases cited.

The appellant, whilst confident in the strength of the position occupied by him, submits from the evidence that the respondent has not shown want of reasonable or probable cause.

Abrath v. North Eastern Ry. Co'y., L. R., 11 Q. B.D. 440.

C. A. Geoffrion, Q. C., represented the respondent who had not filed a factum in appeal.

TESSIER and CROSS, JJ., dissented on the ground that the appellant acted without reasonable or probable cause in taking the criminal proceedings.

RAMSAY, J :—

This case comes up before the court in a most unsatisfactory form. As is not unusual in cases coming from the district of Richelieu we have the evidence swelled to enormous bulk, and in the wildest and most inconclusive form. There are 24 depositions produced on the part of the plaintiff respondent and 23 by the defendant. In addition to all the ordinary inconveniences of evidence taken by stenography, the Sorel stenographer appears to be a wit, and he amuses himself by taking down broken sentences in such a way as to make them scarcely comprehensible. The action, it is contended, is for damages, for slander and for false arrest, and the following quotations are taken, the first from the plaintiff's evidence and the second from that of the appellant.

" Q. Vers le quinze de janvier dernier avez-vous vu mon-

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sieur Gundlack de Sorel, à Contrecœur, chez le demandeur en cette cause ?

R. Oui, monsieur.

Q. Que faisait-il lorsque vous l'avez vu ?

R. Il était arrêté, je pense qu'il venait de cri sa broche chez monsieur Lamontagne, de la broche qu'il avait mis là, pensant que la presse aurait été mise là. Il était chez Norbert Leclerc pour parler de la paille.

Q. Qu'est-ce qu'il lui a rappelé devant vous quand au prix qu'il était convenu de lui payer la paille que le demandeur achèterait pour lui revendre ?

R. Monsieur Gundlack a demandé, a dit à Leclerc, (je n'avais pas su son premier marcher) de forcer à acheter de la paille. Monsieur Gundlack a dit à monsieur Leclerc, " je te paye un bon prix pour acheter de la paille, je paye quatre piastres par douze cents livres et un écu de percentage." Je ne peux pas dire si c'est un écu par quinze cents livres ou par douze cents livres, je n'ai pas bien entendu ces paroles. Et après cela il en a amêné encore quelques voyages après qu'on lui eut montré la paille sâle—ensuite il a commencé à nous demander l'argent pour la qu'elle je voyais pas comment qu'on pouvait lui devoir de l'argent par-ce-que Mr. Copeland luit avait donné la somme de quatre-vingt trois piastres par lui et moi, et que l'on avait pas reçu plus à mon calcul d'après le marché que j'avais fait avec Mr. Leclerc plus de trente à trente cinq piastres de paille—et là il nous demandait cent trente deux piastres ou il livrerait plus de paille disant qu'il voulait plus livrer de paille sans qu'on vient lui donner la somme de cent trente deux piastres sans nous donner aucun compte pour montrer qu'on lui devait cet argent ; et là plus tard quelques jours après Mr. Leclerc nous demandait toujours cent trente deux piastres et là il a dit que si on lui donnait pas cent trente deux piastres qu'il vendrait la paille."

Having helped to get the evidence into this intelligible shape, the respondent becomes restive and declines to file a *factum* saying he can't afford to pay for it. The position of a party so acting is referred to in the XIV Rule

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of Practice. He is deemed to have deserted his suit in appeal and the appellant is heard *exparte*. The consequences of holding the respondent strictly to the terms of the rule of Practice in a case of this sort, where the burthen of proof is entirely on him, might be very serious, for I take it that a hearing *exparte* means, as the words imply, hearing of one side. We do not, however, find it necessary in this case to say how far we might be justified in disregarding the pretentions of a respondent who will not maintain his judgment, or furnish us with the evidence in print, for the judgments and procedure before us furnish us with a very simple mode of dealing with the case. We have, in the first place, the declaration which is in a very peculiar form. It alleges an accusation against plaintiff before a magistrate illegally, maliciously, and without probable cause, by appellant and one Gundlack conspiring together; that thereupon plaintiff was arrested and imprisoned, and on a further hearing, the complaint was dismissed, *faute de juridiction*. The declaration then goes on to state that the accusation was false, untrue, libellous and calumnious, and it further states that the defendants had gone about falsely stating that the facts set out in the complaint were true, all this to the damage of the plaintiff in a sum of $1000.

The judge of first instance dismissed the action, saying that there was no libel in the accusation, and that he had good ground, *cause probable*, for making the accusation, and that Gundlack, who was Copeland's agent, was entitled to tell him of his suspicions.

The case went to review, and there the judges said there were two causes of action, one for slander and the other for false imprisonment, and they maintained the judgment, in so far as it dismissed the action for libel, and they reversed it as regards the false arrest. It is somewhat difficult to understand the motives of the judgment. Why should it be declared that the accusation is not libellous, if the accusation was not only untrue, but malicious and made without probable cause? If again the accusation was, as it has just been described, why

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does the Court of Review take the trouble to give as a separate motive that the magistrate had not the territorial jurisdiction required? One can hardly escape from the idea that the Court of Review thought appellant had good cause of complaint against respondent, but that appellant was liable, inasmuch as he had mistaken the topographical fact that Mr. Lunan had issued a warrant in a case outside of his District. If that was the substantial motive of the judgment, it is clearly erroneous. But what is the story Gundlack, who has been absolved by everybody, tells us? He says that over and over again Leclerc refused to account for the $83 he had received, he insisted on having $130 for unexplained expenditure, and he said he would sell the straw which represented Copeland's money, and he set the threat of arrest at defiance. After all this, Copeland consulted a lawyer, and acted on his advice. This enormous suit is then taken before a judge of the Superior Court, who says the want of fair dealing, on the part of Leclerc, justified appellant in protecting himself, and still we are expected to say that this man acted without probable cause. I think, unless we are ambitious of encouraging appeals, for the pleasure of judging them, we had better let it be known that the decision of the judge of first instance, when he holds there is probable cause for an accusation, will be considered as tolerably conclusive on the point. Surely if a judge, who has studied law for two-thirds of his life, thinks there is probable cause for an accusation, we can hardly call it fault if the uneducated layman shares the opinion.

I did not intend to say more on this case which seems to me to involve a very simple principle of law. But by the remarks of one of my brethren in this court, I understand it to be made a question whether the English or the French law should govern as to the damages arising for an arrest on a criminal charge. It seems to me that this question should offer no difficulty. The introduction of the English criminal law naturally introduced along with it its necessary incidents, one of which is the right to complain. The extent of that right could only be limited

by legislation. It is not pretended that any such exists, for it can scarcely be seriously argued that Art. 1053 C. C. has changed the law. It is the expression, the unfortunate expression, of a dry principle incompatible with other parts of the code, and which must be read with other dispositions of the code. To read it alone does not express an absolute truth. The legal sense has, without question, admitted that the English law was to govern in cases like this, and the best proof is that English technicalities have constantly been used and have even been translated into French in the code. "Cause probable," is not a technicality of French jurisprudence.

It has been also questioned whether a justifiable accusation before a magistrate without jurisdiction gives rise to an action of damages, and an authority has been quoted to establish that an accusation *coram non judice* gives rise to an action against both the person acting as a judge and against the complainant. This is very true, observing the distinction that the want of jurisdiction must be absolute, and not a mere absence of authority owing to an error as to the local extent of the jurisdiction. We are therefore to reverse with costs.

The following is the judgment of the Court :—

"The Court, etc. ;

"Considering that the appellant, in making the complaint on which the plaintiff was arrested, had probable cause for making such complaint ;

"And considering that the magistrate, before whom the complaint was made, had authority to entertain and deal with complaints of this nature ;

"And considering that the defect of jurisdiction—the reason for which the complaint was dismissed—only affected the territorial limits of the magistrate's jurisdiction, and that it does not appear that the appellant in making the complaint before a wrong magistrate, was actuated by malice, or that the said respondent suffered any wrong by his said arrest ;

"And considering that in the judgment appealed from, to wit, the judgment rendered by the Superior Court

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sitting in Review at Montreal, on the 30th September 1882, there is error;

"Doth reverse the said judgment, and proceeding to render the judgment which the said Court of Review ought to have rendered, doth dismiss the action of the said plaintiff with costs as well in the Court below, and in the Court of Review as in the Court of Appeal;

"Tessier and Cross, JJ., dissenting."

Judgment reversed.

Kerr, Carter & Goldstein, attorneys for appellant.
Geoffrion, Q. C., counsel for respondent.
(J. K.)

November 22, 1886.

Coram DORION, CH. J., MONK, RAMSAY, CROSS, BABY, JJ.

ARTHUR H. GILMOUR,
(*Petitioner in Court below*),
APPELLANT;

AND

ROBERT N. HALL ET AL.,
(*Respondents in Court below*),
RESPONDENTS.

Quo warranto—Usurpation of corporate office—C. C. P. 1016.

HELD:—That the proceedings authorized by art. 1016 C. C. P., and subsequent articles of the same section, apply to cases of usurpation of an office in any corporation whatever, without any distinction.

The appeal was from a judgment of the Superior Court, Montreal (JOHNSON, J.), July 23, 1886, maintaining a demurrer to a petition or complaint under art. 1016 *et seq.* of the Code of Civil Procedure.

The judgment of the Court below was in these terms:

"The Court, etc.....

"Considering that the said petition is made to compel

the respondents to show by what authority they hold the position of directors of a railway company, to wit, the Montreal, Portland and Boston Railway Company, which it is alleged they illegally hold and usurp;

"Considering that, by law, the right and remedy invoked by the petitioner do not lie as against persons holding the alleged position of the respondents, nor against any one for usurping a franchise of a mere private nature not connected with public government, such as that which it is alleged the respondents hold and exercise; but only where persons unlawfully take upon themselves to act in any public capacity touching rule and government, as the administration of justice, or the political rights of third parties, or hold or exercise an office known to the law generally;

"Doth maintain the said demurrer and doth dismiss the said petition with costs, etc."

Mr. Justice Johnson, in rendering the judgment, made the following observations:—

This is a demurrer to a petition and order in the nature of a *quo warranto*, under art. 1016 C. P. (sec. 2, c. 10).

There is no pretension that it is anything else than the exercise of the remedy under the statutes which regulated the common law right to a *quo warranto;* nor that the code has altered or extended the right in any manner, or done anything beyond substituting a mode of procedure by summons, instead of the old writ.

The petition alleges the election of petitioners as directors of a railway company, and the wrongful substitution or usurpation of defendants in their place. The question is not one of form: it is whether the right to enquire, and call upon defendants to show their authority exists under the law. They are admittedly acting as directors of this railway company; and if the writ would lie in such a case, of course it would lie in the case of Bank directors, or indeed directors of any trading company whatever. Now it is certain that such a right as is claimed by the petitioner only exists where a party unlawfully takes upon himself to act in any public capacity touching rule

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and government or the administration of justice or the political rights of third persons. "It must be an office "known to the law generally (as clerk of the peace, etc.)," per Littledale, J., in *Reg.* v. *Thomas*, 8 Ad. & Ellis, 188. What are and what are not cases in which the remedy will lie are stated along with the authorities in Cole on *Quo Warranto*; and at p. 165, the case of *Rex* v. *Ogden* is quoted, in which it was held by Bayley, J., that "there is "no instance of a *quo warranto* having been granted "against persons for usurping a franchise of a mere pri- "vate nature not connected with public government."

There was a suggestion by the petitioner's counsel that I should order proof before deciding the point of law. If the parties would consent, I would willingly do that; but of myself I cannot. The proof could only be of the facts alleged: and the *demurrer* for the purposes of the question of law admits them.

There was also a motion to strike the inscription for law hearing, because the petitioner had prematurely inscribed for evidence. I must refuse that motion and dismiss the petition with costs.

I may add that in the case of *Paris* v. *Couture* (1) where the decision was that, under the Municipal Code, elections to municipal offices could be directly attacked by petition, it was also held that a proceeding like the present one substituted for the *quo warranto* would only lie in cases of illegal detention of public offices.

I do not think that the verbal criticism of the article at No. 2 of the cases where it is made to apply requires any notice. The article is confessedly and on the face of it, a reproduction of the statute; and the words "other public body or board" cannot mean to extend this proceeding of a prerogative nature to enquire into the private business of any corporation whatever; otherwise there is not a joint stock grocery or saloon, or cigar shop (and they can all become corporations when they like, under the Act for that purpose) where the courts might not be cal-

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led on to enquire into the authority of the salesman or the bar maid.

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Nov. 16.] *Geoffrion*, Q. C., for the appellant.

Ritchie for the respondents.

RAMSAY, J. (for the Court):—

This appeal is from a judgment maintaining a demurrer. Appellant proceeded by petition under art. 1016, C. C. P., to question the right of Hall and others to hold and exercise the office of directors of the Montreal, Portland and Boston Railway Company, a body politic and corporate, duly incorporated according to law.

This proceeding was met by a demurrer praying that the proceeding should be set aside:

1. "Because the so-called office of director of the Montreal, Portland & Boston Railway Company, mentioned in said petition, is not, nor is it, in said petition, alleged to be a franchise or privilege, or, in any sense, a public office such as contemplated by article 1016 of the Code of Civil Procedure.

2. "Because, as appears by said petition, the office, so-called, which said respondent is alleged to have intruded into and usurped, is an office in a purely private commercial corporation, and not an office of a public nature such as contemplated by said article of the Code of Civil Procedure, and the allegations of said petition do not bring said petitioner's case within the purview of said article, nor entitle him to the remedy which he prays for by said petition."

The judgment of the Court below maintained these pretentions. In this judgment we find it impossible for us to concur. Article 1016 gives the right *to any person interested* to make a complaint whenever another person usurps, intrudes into or unlawfully holds or exercises

1. "Any public office or any franchise or privilege in Lower Canada;

2. "Any office in *any corporation* or other public body or board; whether such office exists under the common law, or was created in virtue of any statute or ordinance."

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The reason given for the judgment is that this remedy is not given against any one for usurping a franchise of a mere private nature not connected with public government. This distinction is not made by the law. On the contrary, paragraph 1 provides for the public office; paragraph 2 provides for any office in any corporation.

We are to reverse with costs.

The following is the judgment of the Court :—

"Considering that the proceedings authorized by art. 1016 of the C. C. P. and subsequent articles contained in the same section, apply to cases of usurpation of an office in any corporation whatever, without any distinction;

"And considering that there is error in the judgment rendered by the Superior Court sitting at Montreal on the 23rd of July 1886, by which the petition and complaint of the said appellant to have the election of the respondents as directors of the Montreal, Portland & Boston Railway Company annulled and set aside, was dismissed upon the demurrer of the respondent Emmons Raymond;

"This Court doth reverse and annul the said judgment of the 23rd July 1886, and proceeding to render the judgment which the said Court below should have rendered, doth dismiss the demurrer filed by the said respondent Emmons Raymond to the petition of the said appellant, and doth condemn the said respondent, Emmons Raymond, to pay to the said appellant the costs incurred on the said demurrer in the Court below, and doth condemn all the respondents in this cause to pay to the said appellant the costs incurred on the present appeal."

J. C. Hatton, Q.C., attorney for appellant.

M. J. Lonergan, attorney for respondent.

(J. K.)

December 30, 1885.

Coram DORION, C.J., RAMSAY, CROSS, BABY, JJ.

ISAAC H. STEARNS ET AL.
(*Defendants in Court below*),
APPELLANTS;

AND

ALICE L. ROSS ET VIR
(*Plaintiffs in Court below*),
RESPONDENTS.

Lessor and lessee—Ejectment—Action by proprietor of undivided half.

HELD :—That the proprietor *par indivis* has a right to bring an action of ejectment against a person holding the property solely by the will of a co-proprietor, the proprietor of an undivided share not having any right to lease the whole property, nor even his own share of it, without the consent of his co-proprietor.

The appeal was from a judgment of the Superior Court, Montreal (TORRANCE, J.), Aug. 22, 1885, maintaining an action in ejectment brought by the female respondent as proprietor in usufruct of one undivided half of the property occupied by the appellants. The judgment of the Court below is reported in M. L. R., 1 S. C. 448.

Nov. 17, 1885.] *W. H. Kerr*, Q. C., and *C. B. Carter*, for the appellants.

Selkirk Cross for the respondents.

RAMSAY, J. :—

This is an action of ejectment and damages brought by the proprietor *par indivis* against the tenant. By the judgment, defendants were condemned to pay damages, and the conclusions in ejectment were granted in full; and from this judgment they now appeal. The points insisted upon now are : that there was no damage, and that the respondent as co-proprietor could not eject the tenant who held by the permission of the other co-proprietor.

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The second of these questions only requires to be examined. It seems to be unquestionable that a proprietor of an undivided share cannot lease the whole property, or even his own share of it, without the consent of his co-proprietor. See Guyot, Bail, p. 12, and Merlin, Bail, as to this, and also as to what the co-proprietor may do in case of refusal of the other co-proprietor to lease. It does not, however, follow, as a consequence, that the proprietor *par indivis* cannot eject a trespasser or a person holding solely by the will of a co-proprietor. Another principle comes in. A co-proprietor can eject the tenant holding from the other co-proprietor, on the same principle that he may bring his action to prevent the misuse of the property. See Guyot "Indivis" 198. Also Dig. Bk. 8 Tit. 5 l. 2. "*Et magis dici potest prohibendi potius quam faciendi esse jus socio.*"

The question of damages should not be touched.

DORION, C. J. :—

The appellants in this case hold no title from the co-proprietor. The only evidence is that J. T. Kerby, the husband of the co-proprietor, says he consented to it. This is no title. There is no sufficient proof that Kerby represented the co-proprietor. Stearns remained in the premises against the will of the other co-proprietor. So that we have a trespasser in possession of the property, and a co-proprietor asking that he be ejected. This demand must be maintained. I reserve the expression of an opinion as to the respondent's right to eject, if there had been a lease from Mrs. Kerby.

Judgment confirmed.

Kerr, Carter & Goldstein, attorneys for Appellants.

Selkirk Cross, attorney for Respondents.

(J. K.)

November 27, 1886.

Coram DORION, C. J., MONK, RAMSAY, TESSIER, CROSS, JJ.

JOHN H. R. MOLSON ET AL.,
(*Petitioners in Court below*),
APPELLANTS;

AND

WILLIAM B. LAMBE ES QUAL.,
(*Intervenant in Court below*),
RESPONDENT.

Prohibition—Powers of provincial legislature—Brewer's license —Quebec License Act, 41 *Vict., ch.* 3.

The appellants caused a writ of prohibition to be issued out of the Superior Court, enjoining the Court of Special Sessions of the Peace from further proceeding with a summons and complaint issued by M. C. Desnoyers, police magistrate, against the appellant Ryan, upon the complaint of respondent, inspector of licenses, charging Ryan with having sold intoxicating liquors without a license.

Ryan was a drayman employed to deliver and sell beer by Molson & Bros., the other appellants, who were duly licensed as brewers under the Dominion Inland Revenue Act, 1880, 43 Vic., ch. 19.

HELD:—1. (Overruling the decision of Loranger, J., M.L.R., 1 S.C. 264), that a writ of prohibition lies to bring up before the Superior Court a defect of jurisdiction of the Justices of the Peace, which is only apparent on proof being made of the allegations of the plea containing matter showing such want of jurisdiction, *e. g.*, that the party prosecuted is the mere agent of a person not open to prosecution.

2. (Confirming the judgment of Loranger, J.) That the power of the Dominion Parliament to legislate as to the regulation of trade and commerce does not prevent the local legislature from passing an Act obliging a brewer to take out a local license permitting him to sell beer or ale manufactured by him, whether he sells such beer at his brewery, or elsewhere by a person paid by a commission on the sales; and therefore the Quebec License Act, 41 Vic., ch. 3, is constitutional.

The appeal was from a judgment of the Superior Court, Montreal, LORANGER, J., March 14, 1885, rejecting a petition for a writ of prohibition. The judgment of the Court below is reported in M. L. R., 1 S. C. 264.

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Sept. 22, 1886.] *W. H. Kerr*, Q. C., for the appellants:—

The facts of the case are as follows:—

On the 10th November, 1882, the present appellants, John H. R. Molson & Bros. and one Andrew Ryan, caused a writ of prohibition to be issued out of the Superior Court, enjoining the Court of Special Sessions of the Peace, sitting in the city and district of Montreal and M. C. Desnoyers, Esq., Police Magistrate for the district of Montreal, from further proceeding with a certain summons and complaint issued by the said M. C. Desnoyers against the said appellant Andrew Ryan, on the 10th June, 1882, upon the complaint of the present respondent, William B. Lambe, Esq., Inspector of Licenses for the revenue district of Montreal, charging the said Andrew Ryan with having sold intoxicating liquors without a license, at the date mentioned in the said summons and complaint.

The appellants, in support of their application for the said writ of prohibition, alleged:

That the appellant, Andrew Ryan, was the employee, servant and drayman of the appellants John H. R. Molson & Bros.

That John H. R. Molson & Bros. and their predecessors carried on the business of brewers at the city and district of Montreal, for over 80 years.

That it has been the custom of the trade and business of brewers to send out their employees and draymen for the purpose of selling and delivering beer to their customers, and that no objection has ever been made until the institution of said prosecution against the said custom.

That the appellants John H. R. Molson & Bros. were duly licensed in accordance with the Inland Revenue Act, 1880, of the Dominion of Canada, which license, according to the custom of the Government of Canada, was issued in the name of one of the members of the firm, to wit, John H. R. Molson.

That the appellant Andrew Ryan, for a long time previous to the 6th June, 1882, was employed in the service of the appellants John H. R. Molson & Bros., and before and since that time was by them sent out as their drayman

with beer bottles and kegs of beer, holding not less than five gallons.

The appellants then set up the issue of the summons and complaint against the said Andrew Ryan, and the plea filed in writing, to the said charge by Ryan, setting forth his said employment by the appellants John H. R. Molson & Bros., and that he was " not guilty " in the manner set forth in the summons and complaint.

The appellants further set forth that M. C. Desnoyers, holding the Court of Special Sessions, had taken jurisdiction over the said Ryan, and had proceeded with the case, and that the same was under advisement by him.

That the Quebec License Law of 1878 and its amendments, under which the prosecution was instituted, was entirely unconstitutional, and moreover did not apply to the said Andrew Ryan.

That the Court of Special Sessions of the Peace had no jurisdiction whatever to try Ryan for the pretended offence so charged against him, nor had the said M. C. Desnoyers any right to take up the case and hear the same. The appellants alleged in support of their pretensions the following reasons :

1st. Because there is no Act of the Legislature of the Province of Quebec which authorises the said complaint and prosecution.

2nd. Because the pretended Act of the Legislature, upon which such prosecution was instituted, is not an Act of the Legislature of the Province of Quebec, but purports to have been made and enacted by Her Majesty the Queen, Her Majesty having no right or title to pass Acts binding in the Province of Quebec.

3d. Because the pretended Act, intituled " The Quebec License Law of 1878," under which the prosecution was instituted is entirely illegal, null and void and unconstitutional, the same not having been passed by the proper body gifted with legislative powers upon the subject in the Province of Quebec.

4th. Because the said Act purports to treat of and regulate criminal procedure.

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5th. Because the penal clause is by fine and imprisonment.

6th. Because the said Andrew Ryan, being in the employ of the said John H. R. Molson & Bros. and acting under their orders, the act of Ryan, in selling the beer, was an act of the appellants John H. R. Molson & Bros., who in their license from the Government of the Dominion of Canada were authorised and empowered so to sell such intoxicating liquor.

7th. Because the appellants John H. R. Molson & Bros. being licensed brewers had the right of selling by and through their employees and draymen without any further license whatsoever under the Province of Quebec License Act of 1878.

8th. Because the Legislature of the Province of Quebec have no right whatsoever to limit, or to interfere with the traffic of brewers duly licensed by the Government of Canada.

That therefore it became necessary for the appellants, for their own preservation, to apply for a writ of prohibition to restrain the said proceedings.

The respondent, in his quality of Inspector of licenses for the revenue district of Montreal, intervened to support the complaint, and to contest the writ of prohibition, and by his intervention set forth:

That the Police Magistrate had jurisdiction to try the case; that the Quebec License Law was constitutional as also its amendments, and particularly with regard to the case of the said Andrew Ryan.

That under clause 92 of the B. N. A. Act, the legislature of the Province of Quebec had the right to pass the license law in question, that even if the said John H. R. Molson & Bros., had the right to sell beer under their license, Ryan had no such right. That moreover the said John H. R. Molson & Bros. themselves had no right, in virtue of said license, to sell the said beer off their premises, without license from the Province of Quebec.

The present appellants answered this intervention, reit-

erating the allegations contained in their petition for the writ of prohibition.

The license of the appellants, John H. R. Molson & Bros., is filed of record, and admissions have been filed by the parties, of the matters of fact set forth in the pleadings and of the custom of trade set forth by the appellants, and further that the legislature of the Province of Quebec returned to the brewers licensed by the Dominion Government, the amount of license fees imposed by Act of the Local Legislature upon said Brewers, owing to and after the decision in the case of *Severn & The Queen*, decided in the Supreme Court of Canada, at Ottawa.

The learned Judge of the Court below, held that the Act in question was constitutional, that the said Court of Special Sessions had jurisdiction over the said complaint, that the said Court could take cognizance of the special circumstances of the case and determine thereon. That the appellants were not without remedy, inasmuch as he held that they could appeal from the decision of the Court of Special Sessions, by a writ of *certiorari*, and that a writ of prohibition did not lie.

It is submitted that the Writ of Prohibition lies to prevent the exercise of any unauthorized power in a cause or proceeding of which the subordinate tribunal has jurisdiction *no less* than when the entire cause is without its jurisdiction. Thus, for instance, a Prohibition lies in England where the Ecclesiastical Courts allow illegal or disallow legal evidence:—Lloyd on Prohibition, pp. 29, 30; High on Mandamus, &c., sect. 781 and n. 4.

It is submitted that the Writ was never governed by any narrow technical rules, but was resorted to as a convenient mode of exercising a wholesome control over inferior tribunals.

The case of *Severn & The Queen*, 2 Supreme Court Reports, 70, establishes the principle that the power to tax and regulate the trade of a brewer, being a restraint and regulation of trade and commerce, falls within the class of subjects reserved by the 91st section of the B. N. A. Act for the exclusive legislative authority of the Parliament of

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Canada; and that a license imposed upon brewers by a local legislature is a restraint and regulation of trade and commerce, and is *ultra vires*.

It is admitted that it has been the immemorial custom and usage in the city and district of Montreal for draymen employed by brewers to sell and furnish beer to customers of the said brewers, as the sale for which a conviction against Ryan was sought to be obtained, was effected, without taking out a license.

It is admitted that Ryan was, at the time of the alleged offence, in the employ of the firm of John H. R. Molson & Bros., brewers, duly licensed under the provisions of "The Inland Revenue Act of 1880," (Canada) and that the sale complained of was effected by him as such drayman of the said firm of brewers.

It is submitted on these facts that the prosecution of Ryan and his attempted conviction of the offence of selling intoxicating liquor without a license is an attempt on the part of the Provincial authorities to tax and regulate the trade of brewers licensed by the Dominion Government and to force them to take out licenses for their draymen in violation of the principles recognized in the case of *Severn & The Queen*.

It is also further submitted that neither the Quebec License Act of 1878, or any other Act passed by the Legislature of the Province of Quebec taxes or regulates the trade of a brewer, and that if any such Act did purport so to tax or regulate the trade of a brewer it would be void and *ultra vires*, and would not grant any power to any Justices of the Peace in or out of Sessions or any other Court to punish by penalty or fine any infractions or violations of such last mentioned Act.

The appellants also submit that there is no sufficient remedy by *certiorari*, and that the Writ of Prohibition is the only available remedy to bring up before the Superior Court the defect in jurisdiction of the Justices of the Peace which is only apparent on proof being made of the allegations of the plea containing matter showing such want of jurisdiction.

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N. H. Bourgouin for the respondent.

Les trois premières raisons des appelants peuvent se réduire à une seule: La loi des Licences de Québec de 1878 est inconstitutionnelle parce qu'elle a été passée au nom de Sa Majesté la Reine qui n'est munie d'aucun pouvoir législatif à ce sujet, dans la province de Québec.

L'intimé ne croit pas devoir s'arrêter à démontrer l'absurdité de pareilles prétentions, imitant en cela l'honorable Juge qui, en rendant son jugement en Cour Inférieure, en a fait bonne justice en n'y donnant presqu'aucune attention. D'après les prétentions des appelants, la législature locale ne serait qu'un simple conseil municipal n'ayant que des pouvoirs délégués du Parlement fédéral. Heureusement que nos cours de justice en ont souvent jugé autrement, et que le Conseil Privé de Sa Majesté a une toute autre opinion sur les pouvoirs législatifs des provinces, comme il l'a jugé dans la cause de *Hodge* et *La Reine*, rapportée au 7e vol Legal News, page 18. Ainsi, l'Acte des Licences de Québec est constitutionnel et dans les attributions de l'assemblée législative de la province de Québec, telles que confirmées par l'Acte de l'A. B. N., de 1867.

QUATRIÈME ET CINQUIÈME RAISONS.—Ces deux moyens ne valent rien, et ne peuvent même soutenir la discussion en face des nombreuses décisions rendues par cette honorable Cour, surtout dans une cause de *Côté* et *Paradis* rapportée au 1er vol. des décisions de la Cour d'Appel, page 374, et dans la cause de *Hodge* et *La Reine*, jugée par le Conseil Privé et citée plus haut.

SIXIÈME RAISON.—Andrew Ryan était, il est vrai, l'employé des autres appelants, mais il vendait de la bière en son propre nom, à commission. Il avait un intérêt dans la vente de cette liqueur. Ceci est clairement établi par les admissions faites devant le magistrat, et produites au dossier. Dans la supposition que les autres appelants, par leur licence du Gouvernement fédéral, auraient eu le droit de vendre cette bière, l'appelant Ryan ne l'avait pas, à cause de sa qualité de vendeur à commission, et il était obligé de prendre la licence exigée par la loi des

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licences de Québec de 1878. Il ne l'a pas fait ; par la clause 71 de la loi des licences, il était donc passible de l'amende qui y est imposée. Le fait que Ryan était l'employé des autres appelants et qu'il n'agissait que sous leurs ordres, ne le disculpe pas d'avoir trangressé la loi des licences, car pour cette offense il doit être traité comme son principal, à moins de démontrer qu'il n'a agi que par contrainte.

SEPTIÈME RAISON.—Les appelants Molson étaient des distillateurs dûment licenciés du Gouvernement fédéral. Après le jugement rendu par la Cour Suprême, dans la cause de *Severn* et *La Reine*, les appelants pouvaient peut-être croire que cette licence leur accordait le droit de vendre dans leur distillerie, sans être obligés de prendre une licence en vertu de la loi locale, la bière qu'ils confectionnaient, mais ils n'avaient certainement pas le droit de colporter et de vendre au dehors cette même bière, sans être tenus de prendre la licence exigée par la loi de Québec. Aujourd'hui, depuis la décision rendue par le Conseil Privé sur la loi des licences fédérale, il n'y a pas de doute que les distillateurs sont obligés de prendre une licence en vertu de la loi locale, puisqu'il a été décidé que les licences pour les ventes en gros appartiennent aux différentes provinces.

HUITIÈME RAISON.—La décision qui vient d'être rendue par le Conseil Privé sur la valeur de la Loi des Licences fédérale, règle cette question. Les distillateurs doivent être sur le même pied que les marchands en gros, surtout lorsqu'ils sortent leur bière de leur établissement pour aller la vendre au dehors de magasins en magasins. Ils ne doivent pas être plus favorisés que les marchands en gros, qui à l'avenir seront forcés de prendre une licence exigée par la loi de Québec. Ce n'est pas la licence que les appelants ont obtenue du Gouvernement fédéral qui puisse les exempter de payer au gouvernement local une taxe que la loi locale leur impose quand cette loi est conforme à la constitution.

Dans tous les cas, il y a dans ces différentes questions, comme dit l'honorable juge de la Cour Inférieure, une

matière de fait et de droit qui est du ressort du magistrat de police à déterminer. Par conséquent, ce dernier avait juridiction dans cette poursuite, et les appelants étaient mal fondés à demander l'émanation d'un Bref de Prohibition. La Cour Inférieure a renvoyé la requête des appelants et l'intimé croit qu'elle a bien fait.

Le Bref de Prohibition ne doit être accordé que dans le cas d'un abus de pouvoir, et seulement lorsqu'il n'y a pas d'autres moyens à employer. Or dans cette cause il n'y a eu aucun abus de pouvoir puisque le magistrat n'avait pas encore rendu jugement, et que les appelants ne savaient même pas quel serait le résultat de la cause. Le Bref de Prohibition est un remède extraordinaire qui ne doit être accordé que lorsqu'il n'existe pas d'autre remède. Il ne doit émaner que dans le cas d'une extrême nécessité et lorsque tous les autres remèdes ne peuvent obtenir le résultat désiré. Or ici, il y avait le *Certiorari* qui offrait aux appelants un remède sûr et efficace contre le jugement du Magistrat de Police, s'il eut été contre eux. Il n'y avait donc pas lieu à l'émanation du Bref de Prohibition. C'est ce qui a été jugé à la Cour de Révision siégeant à Québec en décembre 1883, dans une cause de *Audet dit Lapointe* v. *Doyon et al.*, rapportée au 10e vol. Quebec Law Reports. C'est d'ailleurs la doctrine de High citée plus haut.

CROSS, J., (*diss.*) :—

William Busby Lambe, Inspector of Licenses for the Revenue district of Montreal, prosecuted Andrew Ryan, of the city of Montreal, before the Court of Special Sessions of the Peace at Montreal, presided over by Mathias C. Desnoyers, Esq., Police Magistrate, for having, on the 6th of June, 1882, sold intoxicating liquor in the city of Montreal, without having obtained a License from the Provincial Government authorising such sale.

Ryan pleaded that in what he did he had acted as the employee of J. H. R. Molson & Bros., a firm of brewers, who had carried on business as such for upwards of eighty years in the city of Montreal, and whose custom it had

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always been, as on the present occasion, to send out their employees and draymen to sell and deliver beer to their customers, to which no objection had ever been made up to that time; that said J. H. R. Molson & Bros. were duly licensed under the Dominion Inland Revenue Act, to carry on their said business of brewers and that he, Ryan, was not guilty of the complaint made against him.

The case went to trial before the presiding Judge of the Sessions, who, after evidence taken and the parties heard, took it under advisement.

Thereupon the said J. H. R. Molson & Bros. and the said Andrew Ryan, the now appellants, on the 10th November, 1882, caused a writ of prohibition to issue out of the Superior Court at Montreal, enjoining the Judge of the Sessions from further proceedings upon the complaint of the now respondent.

In their petition for the prohibition they set forth the same facts pleaded by Andrew Ryan, and further, that the Judge of the Sessions had no jurisdiction to try Ryan, for the pretended offence for which he was charged, nor to take up nor hear the case, and that, for the reasons stated in their petition which were given seriatim under eight heads, and which may be summarized as follows :—

The first three heads of objection had reference to the form adopted for passing the enactments of the Provincial Legislature, proceeding as it does in the name of Her Majesty, which has been criticised as unauthorized by the terms of the British North America Act.

4th. The Act purported to treat of criminal procedure.

5th. The penal clause in the Act was by fine and imprisonment.

The 6th & 7th set forth and claimed the right to carry on the business of brewers and to sell their beer in virtue of the Dominion License; and the 8th denied any right in the Legislature of the Province to limit or interfere with the traffic of brewers licensed by the Dominion Government.

The respondent in his quality of License Inspector, intervened to resist the prohibition, and by his contesta-

tion thereof claimed :—That the Quebec License law was constitutional as well as its amendments, and that particularly as regards the acts of Ryan ; that if even J. H. R. Molson & Bros. had the right to sell their beer, Ryan had no such right, nor could J. H. R. Molson & Bros. have any right to sell outside their premises without a Provincial License.

The appellants had put of record the Dominion License relied upon by them, and on the contest raised on the prohibition, the parties agreed on the following admissions :—

1. That J. H. R. Molson & Bros. were brewers, having carried on business as such for a number of years in Montreal, holding a license from the Dominion Government under the Dominion Act, 43 Vict. cap. 19, intituled " the Inland Revenue Act of 1880."

2. At the time of the alleged offence, Ryan was in the employ of J. H. R. Molson & Bros., as drayman, receiving a monthly salary or wages by a commission on the monies he collected for the sale of beer manufactured by J. H. R. Molson & Bros.

3. The sale made by him was so made outside the business premises of J. H. R. Molson & Bros. and to a buyer who had not given his order at their office, but was within the Revenue District of Montreal.

4. It had been the immemorial usage in Montreal, for draymen employed by brewers to sell beer in the same manner without a Provincial License.

5. That the local Legislature of Quebec had refunded to brewers licensed by the Dominion Government the amount of the license fee imposed by the act of the Local Legislature upon such brewers, owing to and after the decision in the case of *Severn* and *The Queen*, (1) decided in the Supreme Court of Canada at Ottawa.

On the above issue and admissions, the case went to judgment in the Superior Court, and that tribunal, by the judgment now appealed from, held that the Quebec

(1) 2 Can. S. C. R. 70.

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License Act was constitutional, that the Court of Special Sessions of the Peace, and the Judge thereof, had jurisdiction over the complaint made against Ryan, and that if aggrieved, the appellants were not without remedy which they might have exercised by *certiorari*. That Court consequently dismissed the petition of the appellants for prohibition.

We are now asked to revise this decision of the Superior Court.

A preliminary question arises, as to whether prohibition is a remedy applicable to the case. This objection was but little pressed at the argument, nor is such technical objection generally viewed with much favor when it appears that a clear right is involved. A *certiorari* would not have been efficacious, as admissions of facts on the prohibition issue had to be put of record to have the merits of the case submitted. I think the prohibition was a suitable proceeding and the Judges of this Court were unanimously of this opinion.

The first three enumerated reasons of the appellants in support of their petition were not specially urged at the argument. I do not think there is any substance in them. Whether or not the appellants are correct in their criticism of the form adopted by the Local Legislature in passing these enactments, and however pretentious it may seem for them to act in the name of Her Majesty if such was not intended by the British North America Act, on which I do not pretend to pronounce an opinion ; it seems to me sufficiently clear by the form adopted that evidence is given of the assent of all the authorities in whom legislative power is vested. It contains all the essentials of a valid Legislative act, and the courts are bound by it. I think I am warranted in saying that none of the Judges are prepared to hold that the act is invalid from the causes referred to.

The fourth enumerated reason can scarcely be considered serious, and as regards the fifth, it should be considered settled by the decision of the Privy Council in the

case of *Hodge* v. *The Queen*.(1) Doubts have indeed been suggested as to whether the point was fairly raised in that case, and, consequently, whether the *dictum* therein held by the Privy Council on the subject should be received as a final ruling. I must say that it has always seemed to me that the No. 15 of sec. 92 of the British North America Act, giving the power of punishment by fine, penalty or imprisonment, conferred the right to cumulate, as well as to distribute such punishments in the manner and to the extent that the body empowered should deem expedient; that an Act conferring power on a Legislative body should be construed liberally and not as a law imposing a punishment for a penal offence; that in giving a construction to the details, a view of the entire subject should be borne in mind; that the object the Legislature must have had in view was the distribution of powers, plenary in their nature, between two bodies who should each have full exercise of the authority to them respectively attributed. It was not the case of a Supreme Legislature giving limited authority to a subordinate administrative tribunal, supposed, therefore, to retain all the power not specifically or in exact terms conferred. It was a case where every reasonable incident to the power conferred was presumed to pass with the concession of the power. The alternate language of fine, penalty or imprisonment may, therefore, be fairly read conjunctively as well as disjunctively, as occasion might call for its application. There was no policy or object, and it could not have been the intention of the legislative power in such a case to hamper or embarrass the concession by limits of no advantage to the grantors, nor of any benefit to the other grantees, nor was it professed that any limitation of power in regard to the matter in question passed to the other grantees or remained with the grantors.

The following enumerated reasons raise the questions principally relied on in the case. As regard the sixth and seventh, I consider we are bound by the ruling of the

(1) 8 Legal News, 18.

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Supreme Court in the case of *Severn* v. *The Queen*, 2 Supreme Court R. p. 70, wherein it was held that a brewer, being licensed under the Dominion Inland Revenue Act, 31 Vic., cap. 8, could lawfully manufacture and sell beer, without obtaining a license from the Dominion Government; that the prohibitory Provincial Act of the Province of Ontario, similar to the one now in question, was *ultra vires*; that the licenses required by such Act were in restraint of trade and in excess of the power of the local Legislature, nor was such power conferred by sub-sec. 9 of sec. 92 of the British North America Act. It seems to me that this precedent covers and meets the present case. Whether we measure it by the extent of power possessed by the Dominion Legislature, as being entitled exclusively to regulate trade and commerce, or as vested with power in all matters not coming within the subjects assigned exclusively to the legislatures of the Provinces; or measure it by the absence of any control of the Provincial Legislature, we in either case alike must come to the conclusion that the sale of beer by Ryan, as effected in this case, could not be prohibited by the local Legislature. The extent of the power of the Provincial Legislature over the subject matter, exclusively of its being involved in Municipal Institutions, in respect of which there is no question in this case, is measured by No. 9 of Sec. 92 of the British North America Act, assigning the Provincial Legislatures, Shop, Saloon, Tavern and other licenses not extending to such as brewers' licenses, as already distinctly decided, and certainly not extending to a general prohibition of the sale of intoxicating liquor in any quantity or in any place whatsoever, as provided for by sec. 71 of the Quebec License Act of 1878, 41 Vic., cap. 3, under which alone, Ryan was or could be prosecuted, which provision, being clearly in restraint of trade, and unauthorised by any provision of the British North America Act, must be held *ultra vires* and void. It is objected that the Dominion License only authorised the carrying on the business of brewer in the business premises of J. H. R. Molson & Bros. and that the complaint against Ryan was for sales

made without the limits of these premises. It is quite true that the license is to carry on the business of a brewer within the specified premises of J. H. R. Molson & Bros., but that is meant for the manufacture, and not for the sale of the beer. The law, sec. 22, requires the license to issue for the place or premises specified in the application, and for such place or premises only. The reason of this is obvious: Were it not so, any brewer, obtaining a single license, could establish breweries all over the Dominion, but the same reason does not hold with reference to the sale of the manufactured article. A right to manufacture implies a right to sell the produce of the manufacture, and no restraint is imposed on such sale, either at the brewery or elsewhere; and if it were it could only be validly done by Act of the Dominion Legislature, and no complaint is here made of the violation of any such Act.

As regards the power of the Provincial Legislature, raised especially by No. 9 of the enumerated reasons in support of the prohibition, there is no question of its exercise in this instance being for local or municipal purposes, and its authority over shop, saloon, tavern, auctioneer and other licenses could not possibly entitle that Legislature to enact, as it has done by sec. 71 of the Statute of Quebec, 41 Vic., c. 3, a general prohibition of the sale of intoxicating liquors in any quantity whatsoever, in any part of the Province whatsoever; and this is the only prohibition in the whole Statute to which the act of Ryan could apply as an infraction. It is clearly an attempt to restrain trade beyond their powers and invalid. Whatever authority they might be supposed to possess as a municipal or police regulation, or to restrict the distribution or sale of intoxicating drinks in shops, saloons, taverns or other localities, could not lawfully extend to such general prohibition as they have attempted. I am therefore of opinion that the judgment appealed from should be reversed, and that the prohibition should stand and be adjudged valid, and the Judge of the Sessions enjoined to cease proceeding on the complaint of the License Inspector.

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MONK, J., concurred in the foregoing dissent.

RAMSAY, J.:—

This is an appeal from a judgment of the Superior Court on the merits of certain questions of law, raised by a proceeding in the nature of a prohibition addressed to the Judge of Sessions. The suit sought to be prohibited is a prosecution before the Judge of Sessions for the infringement of a disposition of the Quebec License Act of 1878. The pretention is that this statute is unconstitutional, and that if the Court is not prohibited, there is no remedy.

The first question raised is whether a prohibition will lie in such case. I think it will, and precisely for the reason advanced in the Court below, for saying it would not lie. It is because there appears to be a fact in question which would not come up on *certiorari*,—namely, whether the party prosecuted is the mere agent of a person not open to the prosecution. It appears to me that it was within the discretion of the Judge below to give the order, and that we should not disturb it.

Being before us, two questions arise. 1. Whether the power to legislate as to "the regulation of trade and commerce," (B.N.A. Act 1867, sect. 91, s.s. 2), is a right so absolute as to restrain the local power to oblige a brewer to take out a local license enabling him to hawk about the streets beer or ale manufactured by him in such quantity as he might sell it at his distillery.

The next question is whether the brewer can do it by another who is remunerated by a commission on the sales. Parenthetically, I should say, the majority of the Court are agreed to confirm the judgment appealed from, but as there is some difference of opinion among the Judges as to the reasoning by which the conclusion is arrived at, I propose, in dealing with the question, to state my own views and those of two of the Judges of the Court, I believe.

It seems to me that all these refinements are mystifications of the real issue we have been seeking to arrive at for the last nine or ten years. If the appellant could not be forced

to take out a license before selling beer at his distillery, it is manifest he could not be obliged to take out a license for taking orders for beer among his customers, and the matter would not be altered by making the drayman agent to take the order and deliver the beer simultaneously. It may be observed that the Quebec License Act of 1878 (41 Vict., ch. 3, s. 71), suggests no such equivocal idea. Whoever *sells*, says the statute, in any quantity whatsoever, intoxicating liquors, must take out a license, and failing to do so, is liable to a fine of $95 for each contravention.

Now, this brings us back to the old question raised in *Angers*, Attorney-General, and *The Queen Insurance Co'y*,(1) which might have been decided in the Privy Council, but which was not there decided. Their Lordships held with us, that the tax in that case was not direct taxation within the meaning of the B. N. A. Act. The majority of the Court here held that the license sought to be imposed was not a license *ejusdem generis* as those mentioned in the S. S. 9, sec. 92 of the B. N. A. Act, 1867. The Privy Council held on this point that it was a Stamp Act and not a License Act, because there was no penalty for the infraction, and because the payment was not a permit to do, but an impost on the thing done.

It is not necessary now to re-discuss whether or not these are the true tests of what constitutes a license, for in the case before us all these elements exist. There is the general power to do, instead of the impost on a thing done, and there is a penalty for selling without having taken out a license. Of course, if *Severn & The Queen* is to govern, we must reverse, for the Court there distinctly held that a brewer's business, the very case now before us, could not be taxed under guise of a license by a local Act. (1 Cartwright, 414).

It must, however, be remembered that this case is not of the highest authority. The present Chief Justice and Mr. Justice Strong dissented, and there was much judicial authority the other way. The Supreme Court is not a

(1) 1 Legal News, 410.

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final Court of Appeal, and the majority of this Court has since refused to be governed by that decision in the tax cases now before the Privy Council, and unanimously in *Lambe & The Powder Company*,(1) also in appeal before the Privy Council. In addition to this the question of liquor licenses has been subject to curious vicissitudes, and the reasoning of the majority of the Supreme Court hardly seems to have prevailed, at least so they have intimated. In a recent case, the Privy Council has intimated that the object of the law might determine its constitutionality. Thus, in *Russell & The Queen*,(2) the object of the statute being the general order and good government of Canada, it was declared to be constitutional; while in *Hodge & The Queen*,(3) the object of the law being municipal institutions in a province, the statute was likewise declared to be constitutional. We have also admitted this principle in *Sulte & Three Rivers*,(4) and that decision was confirmed in the Supreme Court. We are not, therefore, I think, disturbing hierarchical authority in disregarding an isolated judgment so compromised as that in *Severn & The Queen*.

The present case is not one coming under sub-section 8, s. 92. It has nothing to do with municipal institutions. It is simply a question of the right to tax by the Government of Quebec. If it can be defended at all, it is under sub-section 9, s. 92. It is an impost by way of license for the purpose of raising revenue on what is admitted to be the ordinary trade of a brewer. This, I think, is constitutional, when it is fairly imposed, that is, when it appears that there is no fraudulent use of the B. N. A. Act. If it appeared that the local Act was only nominally legislating for the purposes of raising a revenue, and that the statute really was contrived as a prohibitory measure, another consideration might, perhaps, come in. I only allude to this as a precaution, for there is no suggestion of any misuse of the legislative power, and I am not aware that the use of the legislative power to get round the constitutional

(1) M. L. R., 1 Q. B. 460.
(2) 5 Leg. News, 234.
(3) 8 Leg. News, 20.
(4) 5 Leg. News, 330.

Act has, as yet, been formally insisted upon as deciding as to the constitutionality of an Act, although it has been suggested that a case might occur in which that point would have to be considered—*The Colonial Building and Investment Association* and *The Attorney-General*, 1st December, 1883.(1) It seems, however, to be a necessary consequence of deciding from the object of the law, that the Courts must see whether the object is real or delusive.

I think this case must follow the decision in the tax cases and in the case of *Lambe & The Powder Company* until the Privy Council decides that the only licenses the local Legislature shall require to be taken out, *in order to raise a revenue*, are those specially mentioned in sub-section 9, section 92, and that the words," and other licenses " have no meaning ; or, that their meaning is be restricted to licenses *ejusdem generis* as those especially enumerated, and furthermore in the latter case how we are to recognize the composite order which, including shops, saloons, taverns and auctioneers, excludes brewers selling their beer, wholesale or retail. In making this distinction, it cannot be overlooked that the auctioneer sells in a small way, and he also makes sales which cannot be separated from the operations of trade and commerce. Mr. Molson might have sold his beer by an auctioneer, and if so, his beer would have paid toll to the local treasury ; but if he sells it himself the local treasury cannot make him pay to support the local Government. This may, by jurisprudence, become the rule of law which we have to apply ; but it appears to me it will not cease to be an arbitrary and illogical conclusion, and one which it is unfair to presume the Imperial Parliament contemplated.

I am most unwilling, in delivering a judgment on a question of law, to allude to the sensational importance attached to the decision, but these tax cases have been surrounded with such evidences of excitement that it may not be out of place to say a word on the general reason for holding that the Imperial Par-

(1) 7 Leg. News, 10.

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liament did not intend so to restrict local taxation. The cry of the persons carrying on the larger operations of trade is that, "If we may be taxed by the Local Legislatures, we are exposed to a double taxing power, and the ready access to our accumulated wealth, comparatively unrepresented, exposes us to be practised upon to save the pockets of our fellow subjects." The answer to this appears to me to be easy. The right to tax the greater operations of trade and commerce in consideration of the advantages derived from the local organization, appears to me *a priori* to be a fair and reasonable one. To say that it will be unfairly used is a fact which there is nothing to support specially. The tendency of the laws of all parliamentary governed countries is to extend the personal franchise at the risk of leaving property unprotected, and this is, at most, only an instance of what is going on everywhere. We cannot presume that Parliament did not intend to apply the principles here it is applying everywhere else. Lastly, there are two protections. First, the Federal Government can disallow an oppressive act, and it would be its duty to do so if the interference with trade and commerce amounted to an inconvenience. Second, if prohibitory, it would come within the ken of the courts. I am to confirm.

DORION, C. J.:—

The appellants, John H. R. Molson & Bros., and Andrew Ryan, by their appeal, complain of a judgment rendered by the Superior Court, which has rejected their demand for a writ of prohibition to restrain Mr. Desnoyers, police magistrate of this district, from further proceeding on a complaint lodged before him against Ryan for having sold beer by wholesale, without having first obtained a license, as required by the Quebec License Act of 1878.

By their petition, the appellants alleged, in substance, that John H. R. Molson & Bros. had a license to manufacture beer on their premises at the city of Montreal, under the Inland Revenue Act of 1880, of the Dominion of Canada, that Ryan was employed by them to sell their

beer, that the Quebec License Act of 1878 was unconstitutional and that moreover it did not apply to John H. R. Molson & Bros., who, as manufacturers, had a right to sell the beer which they manufactured without a license, under the Quebec License Act, nor to Ryan who only sold for them as their employee and drayman.

The facts established by the evidence and admissions of the parties are that John H. R. Molson & Bros. have a license under the Revenue Act of 1880 (Dominion) to manufacture beer in the city of Montreal, that Ryan, who is in their employ, has sold beer for them by wholesale to their customers throughout the city of Montreal, that the orders for the beer he sold were filled at their establishment and that he received a commission on the price of the beer sold.

Three questions arise on this appeal :

1o. Have the appellants upon their own showing, established such a want of jurisdiction in the police magistrate to entertain the complaint against Ryan as to justify the interference of the Superior Court by means of a writ of prohibition ?

2o. Have the appellants, John H. R. Molson & Bros. the right to sell without a license, under the Quebec License Act, the beer which they manufacture ?

3o. Has Ryan, as their employee, the right to sell beer for them on commission in any part of the city without such a license ?

Since the solemn decision of the Judicial Committee of the Privy Council on the case submitted under the provisions of the Dominion Act, 47 Vict., c. 32, it cannot be disputed that the provincial legislatures have alone the right to grant licenses for the sale of liquor by wholesale, or by retail, nor can it be contended that the provisions of the Quebec License Act of 1878, as regards the granting of licenses for the sale of liquor, are unconstitutional, and the law having given to police magistrates the authority to hear and determine complaints arising out of any infringements of this License Act, Mr. Desnoyers was in the present case the proper judicial officer to decide

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whether or not Molson & Bros. had a right to sell without a license, as required by the License Act, and also whether Ryan was acting as their employee or had a right to sell for them on commission, throughout the city, the beer which by virtue of their license they were authorised to manufacture.

It seems that if either John R. H. Molson & Bros. or Ryan have any license, or are authorised by any law to sell liquor without a special license under the Quebec Licence Act, it is for them to urge such exemptions before the tribunals authorised to take cognizance of breaches against the law, and any decision given on such contestation, although it might be contrary to law could not be said to have been given without jurisdiction.

The decision in the case of the *Charkieh*, 8 L. R., Q. B. 197, seems to apply to the present one. The Charkieh was attached under a warrant issued out of the Court of Admiralty for damages caused to the Batavier by a collision on the Thames. A rule *nisi* was granted for a writ of prohibition on the ground that the Charkieh was the property of the Khedive of Egypt. The Court declined to issue the prohibition, holding the question whether the Charkieh was the property of a foreign potentate, so as to exempt it from liability being one which might properly be decided by the Court of Admiralty. So in this case the question whether Ryan sold for John H. R. Molson & Bros. or on his own account on commission, or whether Molson & Bros. were by any law or authority exempt from taking a license under the Quebec License Act, were proper questions to be decided by the police magistrate, who is authorised to decide all complaints under the Quebec License Act.

The effort made to prevent the police magistrate from adjudicating upon this case seems to me as an attempt to remove the case from a tribunal, having by law jurisdiction over the complaint, to the Superior Court, which has no jurisdiction in the matter.

I do not wish, however, to rest my decision of the case on this point, especially as I understand that my views

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are not shared by a majority of the members of this Court. Coming to the second point, I think that the several decisions rendered on these constitutional questions have considerably elucidated the subject, and that after the judgment in the case of the *Queen & Hodge*(1) and the last decision of the Judicial Committee of the Privy Council, it may be considered as settled, that licenses issued to regulate the sale of liquor are not to be considered as being in restraint of trade and commerce, or for the regulation of trade and commerce within the meaning of the second sub-section of s. 91 of the British North America Act, 1867, but in the nature of police and municipal regulations, coming within the powers of the legislatures of the different provinces constituting the Dominion, and that there is no distinction to be made, as regards the authority of the provincial legislatures, between wholesale and retail dealers in liquor, nor between the sale made by a manufacturer from that made by an ordinary merchant. The law has made no distinction between those different classes of persons. They are all subject to the regulations made by the provincial legislatures as regards the sale of spirituous liquor. If we held that a manufacturer of beer or spirits can sell by wholesale, without a license, as required by the Quebec License Act, we would have to hold that he can also sell by retail without a license, and, therefore, a manufacturer might establish on his premises as many bars or shops for retailing spirituous liquors as he might choose, without being subject to any of the regulations binding on other dealers in the same articles, and established for the protection and security of the public.

The case of *Severn & The Queen* has been cited as governing the present case. We might easily point out some material differences between that case and the present one, but it is not necessary to do so, as the majority of this Court hold that this case is not governed by the Severn case, but by the decision in the Hodge case, followed by last decision rendered by the Privy Council, holding that the right to legislate on the issue of licenses for the sale

(1) 8 Leg. News, 20.

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of liquor, by wholesale or by retail, belonged to the local legislatures. It seems to me that to decide otherwise would be to overrule decisions of this Court in the cases of the *Corporation of Three Rivers & Sulte*, confirmed by the Supreme Court, of *Bennett & The Pharmaceutical Association of the Province of Quebec*,(1) wherein we held that the provincial legislatures had the right to legislate as regards the sale of drugs, poisons and chemicals within the limits of the province, and lastly, the case of the *Hamilton Powder Co. & Lambe*, in which we have decided that the appellants, who were manufacturers of gunpowder, were bound to take a license, as required by the existing laws in the province of Quebec, to keep in their stores gunpowder in quantities exceeding twenty-five pounds, and also the decisions of the Privy Council already referred to, which have dealt with the power of the provincial legislatures to authorise the issue of licenses for the sale of spirituous liquors.

It is unnecessary to refer to the third question, inasmuch as a majority of the members of this Court are of opinion to affirm the judgment rendered by the Superior Court, and the demand of the appellants is therefore refused.

The judgment of the Court is as follows :

" The Court, &c.

" Considering that the case is properly before the Court on a writ of prohibition, and further that the Statute of Quebec referred to is within the powers of the Legislature of the Province of Quebec ;

" Considering that there is no error in the judgment appealed from, to wit, the judgment rendered by the Superior Court sitting at Montreal, on the 14th of March, 1885, doth confirm the same with costs of both courts (MONK and CROSS JJ., dissenting)."

Judgment confirmed.

Kerr, Carter & Goldstein, attorneys for the appellants.

N. H. Bourgouin, attorney for the respondent.

(J. K.)

(1) 1 Déc. Cour d'Appel, 336.

November 22, 1886.

Coram DORION, C. J., TESSIER, CROSS, BABY, JJ.

Ex parte WARD, Petitioner for writ of *Habeas Corpus*.

Habeas Corpus—C.C.P. 1052—*Process in civil matters.*

A person, imprisoned under a writ of *contrainte par corps* for failing to produce effects of which he had been appointed guardian, petitioned for a writ of *habeas corpus*, on the ground that the warrant under which he was committed, contained no enumeration of the effects he was required to produce.

HELD:—That the petitioner being imprisoned under process in a civil matter, the Court had no authority to grant a writ of *habeas corpus*. C.C.P. 1052.

DORION, CH. J.:—

This is a petition on the part of Ward, who is imprisoned in the common jail, under a warrant issued from the Superior Court. A great many grounds were urged by the petitioner, most of them being of small importance in the case. But one ground which has caused some difficulty, is this: The judgment was given against Ward, as guardian, for not producing effects of which he was appointed guardian. He was condemned to produce the goods seized or, in default, to pay the amount of the plaintiff's debt. In the commitment, it is not stated what goods he is to produce. It is evident that the commitment, as a commitment, is not valid, for the commitment should indicate what he is to do. He could not go to the jailer and say, "Here are certain goods, I ask my discharge." The jailer could not discharge on that. The commitment is, therefore, insufficient, as an ordinary commitment; it should have contained a list of the goods he is to produce. But another question comes up. This is a judgment of a civil court, and Art. 1052 of the Code of Procedure says the provisions of the Code respecting *habeas corpus* do not apply to any person imprisoned for debt or under any action or process in civil matters. This man is imprisoned under a process in a civil matter, and the question is whether this Court can interfere. The subject has always been one

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of great difficulty. In one case, the late Mr. Justice Aylwin granted a *habeas corpus*, and the late Mr. Justice Drummond did the same thing in another case. Following these precedents I have granted a writ in two or three cases. In one case there was no condemnation to *contrainte*, but the prothonotary had issued his warrant for *contrainte*. But in a case before this Court, where the amount of costs was not stated in the judgment, the Court decided that it had no right to release the party upon a *habeas corpus*. (1) This settles the point so far as this Court is concerned, and the application must, therefore, be rejected.

CROSS, J.:—

The petitioner, imprisoned under a writ of *contrainte par corps* for failing to produce effects for which he was appointed guardian under a *saisie exécution*, petitions the Court for *habeas corpus*, claiming his release by reason of informalities in the warrant under which he is committed to gaol, and especially as it contains no enumeration of the effects he is required to produce.

The decisions of this Court and of the Judges have not been uniform on this subject. It is difficult, by any review of its jurisprudence, to arrive at any certain rule for our guidance in cases like the present. We have in our Code of Civil Procedure a chapter, viz. cap. 12, under the rubric of *Habeas corpus ad subjiciendum* in civil matters, concluding with art. 1052, which declares that "The "the provisions of this chapter cannot be extended to the "discharge of any person imprisoned for debt or under "any action or process in civil matters."

This rule is very comprehensive and seems to exclude interference with imprisonment decreed by any judgment or order of the higher courts of record having jurisdiction in civil matters. It will readily strike the enquirer that the resulting inconvenience might be very great, if this remedy were applied to the control of superior courts of record in the exercise of their civil pro-

(1) *Ex parte* McCaffrey, petitioner for *Habeas Corpus*, 3 Leg. News, p. 106.

ceedings, especially if the same strictness were to be observed in regard to them as is practised in the supervision of the proceedings of courts of inferior or of limited jurisdiction, and this we know is not done, because, with courts of inferior or limited jurisdiction they are strictly bound to set forth their authority on the face of their proceedings and they are presumed not to possess any authority beyond what is so shewn in their said proceedings. The general presumption is against their authority in all matters not shewn to be within it, while with Superior Courts of Record, the opposite rule prevails; jurisdiction is presumed in their favor in all matters falling within the general scope of their authority. This would seem to limit the enquiry, in a case like the present, as to whether the petitioner had been committed on a writ of *contrainte par corps*, and if that was within the general scope of the powers of the Circuit Court, which I think is to be considered a Superior Court of Record, the regularity or irregularity of the proceedings in such a court, I take it, would not be properly a subject of enquiry on *habeas corpus*, but would be taken advantage of or remedied by an application to the same Court where the proceedings were held. In this case, I understand the chief objection taken is the absence of an enumeration of the effects in the commitment required to be produced by the petitioner, before being entitled to his liberation, and that although this absence occurs in the commitment, the Record containing the *procès-verbal* of seizure shews what they are, and perhaps the judgment of the Court also does so, if not, the latter omission being rather a serious omission might possibly furnish some mode of relief before the same court, but if enumerated in the judgment, the petitioner would not seem in a legal sense entitled to make it matter of serious grievance, as he could readily find what he is held for by reference to the Record, and for the purpose of ordering his imprisonment according to the rule I have mentioned, the presumption would be in favor of regularity. Even in criminal matters, in certain cases it might be contended that a prisoner under an irregular

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commitment should not be released, if a good conviction exists for the offence for which he is imprisoned, see statute 32 and 33 Vic., cap. 31, sec. 71: "No conviction or "order or adjudication made in appeal therefrom shall be "quashed for want of form or be removed by *certiorari* "into any of Her Majesty's Courts of Record, and no war- "rant of commitment shall be held void by reason of any "defect therein, provided it be therein alleged that the "party has been convicted, and there be a good and valid "conviction to sustain the same."

This appears to have been intended more particularly to prevent a failure of justice in cases of the setting aside of proceedings by *certiorari* on strictly technical grounds, where offenders were evidently guilty, but from want of form convictions against them could not be sustained; but I think it might have had an interpretation broad enough to have included cases where the cause of conviction did not sufficiently appear by the commitment, but could be found in a perfectly valid form by reference to the conviction. This construction, I think, would be highly advantageous to the satisfactory administration of justice. But returning to the application of the remedy by *habeas corpus* in matters of process of the higher Courts of civil jurisdiction, the principles that are applicable seem to me to have been thoroughly explained and the subject exhausted by the reasoning in the case of *Exparte Donaghue*(1). The force of that reasoning, I think, it would be difficult to refute. That case occurred before the enactment of the Code of Civil Procedure, and although the decisions have not been uniform either before or since the Code came into force, I think they intended to follow those decided in the sense maintained in the *Donaghue* case, and there have been quite a number that favored that view.

For these reasons I think the Court cannot interfere with the imprisonment of the Petitioner. The *Habeas Corpus* must be quashed, and the prisoner remanded.

(1) 9 L. C. R., p. 285.

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The Court made the following order:—

"The Court having heard counsel on the petition of the said Percy M. Ward, now detained in the common gaol of the district of Montreal, by virtue of a warrant based upon a rule of *contrainte par corps*, issued from the Circuit Court, by which petitioner was ordered to be imprisoned until he should produce certain moveables under seizure, and of which he was declared guardian, praying for a writ of *habeas corpus*, and mature deliberation being had;

"It is considered and adjudged that the said Percy M. Ward do take nothing by his said petition which is hereby rejected."

W. H. Kerr, Q. C., for the petitioner.

J. G. D'Amour, contra.

(J. K.)

November 22, 1886.

Coram DORION, C. J., RAMSAY, CROSS, BABY, JJ.

THE EXCHANGE BANK OF CANADA,
(*Plaintiff in Court below*),
APPELLANT;

AND

ROBERT HALL,
(*Defendant in Court below*),
RESPONDENT.

Bank in liquidation—Cheques paid after suspension—Recourse of liquidators.

The respondent, having funds to his credit in a bank which had suspended payment, drew cheques on the bank for various sums. These cheques were accepted by the bank on the same day, and the respondent then, for valuable consideration, disposed of them to various parties who were paid the respective amounts by the bank, by credits or otherwise.

HELD:—That the bank had no action against the respondent to recover the amount of the cheques so paid, their recourse, if any, being against the parties to whom they had paid the money.

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Exchange Bank & Hall.

The appeal was from a judgment of the Superior Court, Montreal, Taschereau, J., 5 March, 1885, in the terms following :—

" La Cour, etc.

" Considérant que l'acceptation faite par la Banque le 20 septembre 1883, des chèques du demandeur mentionnés dans la déclaration est une opération différente et distincte des paiements subséquemment effectués par elle des montants portés aux dits chèques, que par cette acceptation la demanderesse a donné, il est vrai, contre elle-même une action directe aux porteurs des dits chèques, mais que vu l'insolvabilité publique et notoire de la demanderesse à l'époque de la dite acceptation, elle aurait été fondée à opposer aux dits porteurs (de même qu'au défendeur lui-même) l'exception résultant de la dite insolvabilité, et de l'impossibilité de payer les dits chèques sans commettre des préférences frauduleuses ;

" Considérant que sous les circonstances, la Banque demanderesse, nonobstant la dite acceptation, ne pouvait et ne devait pas payer les dits chèques au moyen des crédits donnés aux différentes personnes mentionnées dans l'enquête et qui ont déposé les dits chèques à la dite Banque ; que ce sont ces paiements ou ces crédits donnés aux dites personnes qui dans l'espèce, constitueraient des préférences frauduleuses ou des paiements préférentiels et non l'acceptation des dits chèques faite le 20 septembre 1883, laquelle pouvait et devait être répudiée ;

" Considérant que vu la dite insolvabilité publique et notoire de la demanderesse, datant du 15 septembre 1883, tous les chèques acceptés par elle, et tous ses effets de commerce, n'étaient négociés depuis cette dite date qu'aux risques et périls des acheteurs, et pour moins que leur valeur nominale, qu'il y avait doute raisonnable au sujet de la reprise des paiements de la dite Banque dans les quatre-vingt dix jours à elle accordés par la loi ; que ce doute prêtait matière à des spéculations sur la valeur des effets de la dite Banque, et que c'est dans le cours de ces spéculations que des tiers ont acquis du défendeur, à leurs risques et périls, les dits chèques acceptés, lesquels chèques

le défendeur avait droit de leur vendre, sans se rendre coupable d'aucun acte illégal ou frauduleux, et sans se rendre passible d'aucune action en recouvrement ou répétition ;

" Maintient les défenses et renvoie l'action de la demanderesse avec dépens."

Sept. 25, 1886.] *J. N. Greenshields* for the appellant :—

The appellants instituted the present action against the respondent, to recover the sum of $1985.06, the amount of five cheques drawn by respondent against his deposit with appellant, the said cheques being severally dated the 20th September, 1883, and on that day accepted by the Bank, and paid respectively on the 1st and 2nd days of October and the 9th of November, 1883.

The Exchange Bank suspended payment on the 15th September, 1883, by a resolution duly passed by its then Board of Directors ; the said suspension being made under the provisions of Sect. 57 of the Banking Act, 34 Vict., ch. 5. Notice of such suspension of payment was duly given to the different Banks and financial institutions, and the same became public and notorious, immediately, to the knowledge of the respondent. The suspension continued until the 22nd of November, 1883, when a petition was presented by a creditor, asking for a winding up order of said Bank, under the provisions of the Statute, 45 Vict., chap. 23, and on the 5th of December of the same year, a winding up order was issued and the Bank placed in liquidation, and liquidators appointed.

The evidence shows that the cheques in question were not paid directly to the respondent personally, but that he transferred them to certain parties who obtained payment of them from the Bank, either in cash or by having them credited on account of the indebtedness of said parties to the Bank, thereby reducing their liability to the Bank.

The case turns upon two points, (1) Could the Bank make a valid payment to its creditors after the suspension on the 15th September, 1883 ? (2) If it be held that it could not make such payment, was the payment of the

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cheques in question, as made in this case, a payment to the respondent ?

The suspension of the Bank was at the time notorious, and was published in the leading newspapers, and of this fact the respondent had ample knowledge. On the 15th September, 1883, the date of the suspension, it is clearly shown by the evidence in this case that the Bank was at that time hopelessly insolvent.

The appellants contend that under the common law and particularly articles 1032 to 1038, inclusive, of the Civil Code, the Bank could not at that time or after the 15th September, 1883, make a valid payment to any of its creditors. The suspension as provided for under Sec. 59 of 34 Vict., chap. 5, must be held to mean something. It cannot mean that the Bank could pass a resolution of suspension which is binding upon its creditors to such an extent that they could not force the payment of a claim during the ninety days, whereas on the other hand the said Bank might pay its favored creditors.

The Judge who rendered the judgment of the Court below, held that the insolvency was public and notorious, but that the right party to proceed against, on the cheques in question, was not the drawer, to wit, the respondent, inasmuch as he had assigned and transferred the cheques previous to their payment, and therefore the appellants have no right of action against him. The appellants respectfully contend, therefore, that the Bank could not pay any of its creditors after the 15th September, 1883, and that the payment of the cheques in question was a payment to the respondent, and for the repayment of which he is liable, for the benefit of the mass of the creditors of the said Bank.

The holder of a cheque is the mere agent of the drawer to procure the money ; Daniel, Vol. 2, p. 643 ; *Brown* v. *Lockie*, 43 Ill. 501. Drawing a cheque is an appropriation of so much of the drawer's funds ; Parsons on Bills and Notes, Vol. 2, p. 59. A cheque, by the best writers upon banking, is defined to be merely an instrument by which a depositor seeks to withdraw his funds from the Bank,

Morse on Banking pp. 249 and 260, and Grant on Banking, p. 12. The respondent herein did nothing more than draw his cheques in the ordinary and usual manner, and it matters not, so far as the respondent is concerned, whether the cheques were taken to the Bank by respondent himself or presented and paid to some other person to whom the respondent delivered over the cheques. It was a withdrawal by respondent of his funds in the Bank, by means of his cheques or orders upon the Bank, instructing them to pay over the monies standing at his credit. It differs altogether from an assignment of the claim of the respondent against the Bank. Morse on Banking, at p. 257, states clearly that the negotiation of cheques by transfer is confined in its operations to those which are payable in money, upon which payment in legal tender can be demanded. The respondent herein could not draw a cheque at the time, which was payable in money. The Bank had no right to pay, and the respondent knew it had no right to pay his cheques, and neither the respondent nor the holders of the cheques could demand the payment thereof in legal tender, from the Bank.

The mere drawing of a cheque and a delivery to a third party does not operate an assignment of the amount of money mentioned in the body of the cheque as against the Bank upon whom the cheque is drawn.—Morse on Banking, p. 275 ; *Hopkinson* v. *Foster*, 19 L. R. Eq., p. 74 ; Daniels, Vol. 2, p. 651 ; *Wharton* v. *Walker*, 4 B. & C., 463 ; *Yates* v. *Bell*, 3 B. and Ald. 643 ; *Schroeder* v. *Central Bank*, 34 L.T. R. 735 and 24 W.R. 71 ; Parsons Vol. 2, p. 60, also foot note and authorities there cited.

The respondent in this case obtained payment of his cheques, and it is respectfully submitted that it is immaterial in whatever mode it was, the respondent herein obtained payment, whether direct to himself or by the agency of a third party, he is responsible for the return of the amount so paid, and is equally responsible whether the payment was effected by the payment in cash to a third party on his own order, or by the delivery to a third party of valuable securities for the cheques. The payment

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was made and the value given upon respondent's orders, and the bearer of the cheques must be regarded as being the agent for the reception of the money. It is respectfully submitted that it is no defence for the drawer of the cheques to say that he had sold his cheques for less than their nominal value, and that they were not cashed by himself. The Bank honored his orders without right, as an insolvent debtor, and thereby committed an injury to the other creditors upon the order of the respondent, for which there attaches to respondent a responsibility to repair the injury. A credit given for the amount of a cheque by a Bank upon which it is drawn is equivalent to payment of the cheque. This is clearly laid down by Morse on Banking, p. 274, also in *Foster* v. *Bank of London*, 3 Foster and Finlayson, p. 214; *Addie* v. *National Bank*, 45 N.Y., p. 735; Daniels on Negotiable Instruments, Vol. 2, p. 636.

It will be contended that the drawing of a cheque by a depositor, and its delivery to a third party who obtains the acceptance of the same, is a recognition by the Bank of the assignment by the drawer, and of the holder as the Bank's creditor. But the Court will remark that, in the case now under discussion, the cheques were accepted by the Bank, not in the hands of third parties, but they were brought to the Bank, and their acceptance procured by the respondent himself. This acceptance, the appellants respectfully contend, was an illegal and unwarranted acceptance on the part of the Bank. Its functions had ceased, and the acceptance of a cheque means a declaration, if it means anything, on the part of the Bank, that it had funds with which to pay the cheques. The respondent, when he obtained the acceptance, knew perfectly well that the Bank had no funds with which to pay the said cheques, and after obtaining the acceptance he proceeds to sell the cheques or part with them at a large discount off their face value. The effect of the transaction as carried out is one which tends to injure the general creditors of the Bank, and it is an injury which has been caused to the other creditors by the appellant, unauthorizedly, and without legal right, recognizing and giving effect to the written orders of the respondent, namely his cheques.

R. D. McGibbon, for the respondent:—

The questions to be decided by this appeal are: was the respondent guilty of obtaining a fraudulent preference? and can the liquidators recover the amount of the checks from him?

The Act respecting Insolvent Banks, 45 Vict. ch. 23 (1882) contains certain provisions regarding fraudulent preferences, in virtue of which the appellant's action appears to have been instituted, but an examination of the sections in question, 71 to 77, will show that the present case does not fall within the purview of the statute.

As pointed out by the Judge in the Superior Court, the mere acceptance of respondent's checks worked no disadvantage to the Bank or the creditors. These checks, although certified could have been refused by the Bank when offered by the different debtors who had subsequently deposited them, and if any fraudulent preference was given in respect of them, it occurred not by their acceptance but by their receipt in liquidation of the debts due by Gilman and the other debtors.

The respondent contends that by his sale of the checks in question, accepted by the Bank, he merely transferred his claim against the Bank *pro tanto* to the vendees of the cheques. This, he submits, he had a perfect right to do, more especially as the Bank was not in any way prejudiced by the transaction. It made no difference to the Bank who its creditor was. It could have declined the deposit of the cheques at their face value by Gilman *et al.*, and if any wrongful act was committed at any time, it was when the cheques were paid in by these persons. Whatever action the Bank may have against them, respondent contends that it has none against him.

It could hardly be pretended that respondent would not have had the right, had he so wished, to execute a notarial transfer of his claim and have it signified on the Bank on the 20th September. The Bank could not have objected to such action on the part of respondent, nor could the transfer have been attacked by others. There is no law prohibiting a creditor of an insolvent from disposing of his claim.

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By accepting and marking respondent's cheques, the Bank ceased to be his debtor and became the debtor of the holder of the accepted cheques;—Daniel—Negotiable Instruments, s. 1601; Morse—Banks and Banking, p. 199.

By the Civil Code, the holder of an accepted cheque has a direct action against the Bank;—C. C. 2351.

As Varey testifies, respondent's account *was closed* immediately upon the acceptance. The transferees of the cheques then became the creditors of the Bank, and any fraudulent payment made to them can only be recovered from them.

RAMSAY, J. (*diss.*):—

This case raises a somewhat novel question. The respondent, a depositor in the Exchange Bank, drew checks on the bank after its insolvency, presented them, had them accepted, and sold them to one Weir, who was paid in full by the bank. The depositors lost a considerable part of their deposits by the insolvency of the bank, and the liquidators seek to recover from the depositor the amount so drawn out by Weir. They say, we paid to your agent, the holder of your cheque; our payment *to* him is a payment to you, and as that payment was made through error, we have a right to recover the money so paid from you.

The other view is this: The holder of a cheque is only considered as the agent of the drawer in a limited and special sense. He is really his *cessionnaire* of so much of the depositor's funds as are in the bank; the liquidators chose to pay him more than they ought to have done; the error is that of the bank, for which the depositor is not *garant*, unless he profited, and he did not profit.

This answer is very ingenious, but is it sound? I believe we are all agreed that the acceptance does not affect the case. It is plain that the insolvent could not accept to the detriment of the liquidation. The liquidators paid on the depositor's order; it turns out that the depositor had no right to give such an order. The peculiar relations of the depositor and the purchaser of the cheque are unknown to the bank; and it appears by the face of the con-

tract that the liquidators paid to the discharge of the depositor,(1) who cannot even tell who the purchaser was. It has been argued that if the depositor had made a regular cession of his rights, and that the bank had paid in full, the *cédant* would not have been liable to pay back the money. That is clear, for the bank was in error. Here the bank was not in error so far as respondent is concerned, for they paid on his order. *Il s'enrichit aux dépens d'autrui.* If a solvent bank, having no funds of A, paid his cheque by error, would A be entitled to refuse to refund by saying that he gained nothing by the cheque, or by proving he sold it for a song to the person paid? If the rule is not applicable to a solvent bank, what principle puts the right of an insolvent bank on another footing?

CROSS, J.:—

On the 20th September, 1883, the respondent Hall, having funds to his credit in the Exchange Bank, appellant, drew five checks on that bank for sums the aggregate of which amounted to $1,985.00, which the bank on that day accepted. One of these checks was drawn payable to the order of Wm. Weir, who endorsed it without recourse to a third party; the others were payable to bearer.

Hall, afterwards, disposed of these checks, which were made payable to bearer, to various parties, for valuable consideration, they got paid their respective amounts by credits in their accounts with the bank or otherwise, and of the following dates, viz. the 1st and 2nd of October and the 9th of November respectively. The Exchange Bank in liquidation now sue Hall, claiming to recover from him the amount of these several checks as for a fraudulent preference obtained by him from the bank.

Hall defends himself on the ground that he himself received nothing from the bank, that he assigned his

(1) A cheque is money. It is not given for value; it is "un simple mandat de paiement; il peut avoir été créé ou pour un prêt, ou pour un acte de libéralité, ou pour tout motif étranger de l'argent, et il ne repose pas virtuellement sur une cause empreinte d'un caractère commercial." Nouguier, p. 29. (Note by RAMSAY, J.)

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claims to other parties for such value as he could obtain for them, as he had a right to do, and if the bank chose to pay in full or in part the holders of the checks, they did so at their own risk and have no claim by reason of such payments upon him Hall, but if entitled to restitution. must look for it to the parties to whom they paid the money.

The Superior Court considered this a sufficient defence and dismissed the action of the bank, and they have appealed from the judgment.

By the proof it is shewn that the bank suspended payment on the 15th September, 1883, which suspension was declared by a resolution of the directors of that date and was publicly announced. Hall himself received nothing from the bank, and it is not shewn what he realised from the sale or transfer of the checks.

The question at issue in the case is whether the bank has any action against Hall for the money the bank paid to the holders of the checks. Hall was a creditor of the bank and had a right to assign his claim, but he could give no transferee any greater right than he possessed himself. On the declared insolvency of the bank, his right was no longer a right to be paid at once, and in full, but a right to receive dividends out of the insolvent estate concurrently with the other creditors of the bank; this was the right he handed over to the transferees of his checks, his authority could go no further, and this authority and no more vested in the transferees. Whatever they did or accomplished in excess of this was outside and beyond the power given them by the transferor of claims against an insolvent institution, and whatever that institution or its administrators did beyond its duty in dealing with the holders of the checks as creditors of the bank, they did at their own risk. Having paid the amount of the checks to the holders, they did so wrongfully, in excess of their duty and without any legal warrant or authority, and the recipients of the money got it without any legal right, and beyond the authority vested in them as transferees of claims against an insolvent estate. If the bank

is entitled to restitution of these sums they must look for such restitution to the parties to whom they wrongfully paid the money, and who wrongfully and without authority received it.

If the holders of the checks were Hall's agents, they were so for the exercise of his legitimate rights only, and not to obtain fraudulent preferences or unauthorised payments. It might be questionable how far the acceptance of the checks was valid, but however this question might be solved, it would not seem to make any difference, the payments was in either case unauthorised, and as they were not made to Hall, he cannot be looked to for their restitution. The acceptance was matter of indifference to the bank; to them it was immaterial whether they paid the dividends to Hall or to his transferees; the acceptance was simply the recognition of a debt they owed and afforded evidence to a third party that Hall had funds in the bank, but operated no change as to the duty of the bank or its administrators to refuse payment on the presentation of the checks, allowing the holders to take their recourse to recover their share in the distribution of the assets of the bank. I am, therefore, of opinion that the judgment of the Superior Court, dismissing the action of the liquidators of the bank, is right and should be confirmed.

Judgment confirmed.

Greenshields, McCorkill & Guerin, attorneys for appellant.
McGibbon & McLennan, attorneys for respondent.

(J. K.)

November 20, 1886.

Coram DORION, CH. J., MONK, RAMSAY, CROSS, JJ.

J. PETERS,
(*Plaintiff in Court below*),
APPELLANT;

AND

THE CANADA SUGAR REFINING CO.
(*Defendants in Court below*),
RESPONDENTS.

Charter party—Voyage direct from Havana to Montreal—Deviation—Right to touch at Sydney for coal.

The charter party described the voyage in writing as being from Havana, Cuba, "to Montreal direct *via* the river St. Lawrence." A printed clause declared that the steamship should "have liberty to tow and "be towed, and to assist vessels in all situations, *also to call at any "port or ports for coals, or other supplies.*"

HELD, (Reversing the judgment of the Court below):—That the fact that the steamship called at the port of Sydney, C. B., for coal, in the course of the voyage, was not a deviation therefrom other than permitted by the charter party, and that the increased premium of insurance paid by the charterers in consequence of the vessel calling at Sydney could not be deducted from the freight.

The appeal was from a judgment of the Superior Court, Montreal (PAPINEAU, J.), February 29, 1884, maintaining respondents' tender. The judgment is in the following terms:—

"La Cour, etc.

"Considérant que le demandeur agissait sous la Charte-Partie produite en cette cause comme son Exhibit No. 1, étant tenu de faire, avec toute la diligence possible, avec le steamship "Huntingdon" contenant la cargaison convenue, le voyage direct de la Havane (île de Cuba) à Montréal *via* le fleuve Saint-Laurent, et que la désignation de ce voyage direct était écrite à la main dans la Charte-Partie, pendant que la stipulation que le steamship aurait

la liberté d'arrêter à aucun port ou ports pour du charbon ou autres approvisionnements était imprimée ;

" Considérant qu'un voyage direct est un voyage d'un port à l'autre, sans entrer dans un port intermédiaire, et que la stipulation écrite que le voyage serait directe, l'emporte sur la stipulation imprimée qui porte que le steamship aurait la liberté d'arrêter à un port ou à des ports pour y prendre du charbon et d'autres approvisionnements ;

" Considérant qu'il est prouvé que le dit steamship, en partant de la Havane a pris sa feuille de route (*clearance*) pour Sydney, où il a arrêté pour prendre du charbon, et qu'il a ensuite repris sa route de Sydney à Montréal, et qu'en ce faisant il n'a pas fait son voyage direct de la Havane à Montréal, mais deux voyages, l'un de la Havane à Sydney, l'autre de Sydney à Montréal ;

" Considérant que le voyage convenu dans la Charte-Partie étant un voyage direct de la Havane à Montréal, le steamer était censé avoir, en partant, une quantité de charbon suffisante pour faire ce voyage, et que la plaidoirie et la preuve n'établissent pas qu'il y eut nécessité imprévue, lors du départ de la Havane, d'arrêter à Sydney pour y prendre du charbon ;

" Considérant que la défenderesse n'était pas tenue de mentionner dans sa police d'assurance, que le "Huntingdon" avait la liberté d'arrêter à un port ou à des ports pour y prendre du charbon vu que cette stipulation imprimée était détruite par la stipulation écrite d'un voyage direct ;

" Considérant que le demandeur n'a pas allégué dans son action la coutume ou l'usage pour les vaisseaux venant de la Havane à Montréal d'arrêter à Sydney pour y prendre du charbon sans y être forcés par nécessité résultant des périls de la mer, et que la preuve de tel usage ou coutume, faite sans réserve des objections de la défenderesse, ne doit pas être admise, et que la motion du demandeur pour faire concorder la plaidoirie avec cette preuve doit être refusée ;

" Considérant, d'ailleurs, qu'il n'y a pas de preuve d'un usage constant dans ce rapport ;

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" Considérant qu'en arrêtant à Sydney, comme il l'a fait, le demandeur a contrevenu à la Charte-Partie, augmenté les risques du voyage, et forcé la défenderesse à payer une prime d'assurance additionnelle pour tenir la cargaison couverte, et qu'elle avait droit de retenir le montant de cette prime à même le fret qu'elle devait payer au demandeur;

" Considérant qu'il est prouvé que la défenderesse a payé cette prime additionnelle avant de savoir si la cargaison était ou non avariée par suite du fait que le " Huntingdon " avait touché à Sydney et y avait pris du charbon;

" Considérant qu'il est prouvé que les offres faites par la défenderesse étaient valides et suffisantes, et que la défenderesse a prouvé les allégations fondamentales de sa défense et que celle-ci est bien fondée, déclare les offres valides et suffisantes, et condamne, en conséquence, la défenderesse à payer au demandeur la somme offerte de $45.30, autorise en conséquence le demandeur à retirer la dite somme de $45.30 qui a été déposée en Cour, et renvoie l'action du demandeur pour le surplus, ainsi que sa motion pour amender, avec dépens de contestation et d'instruction contre le demandeur, distraits, etc."

Sept. 25, 1886.] *H. Abbott* for the appellant :—

The Court below considered that the " Huntingdon " undertook to make the voyage from Havana to Montreal direct *via* the River St. Lawrence; and that the agreement that the steamship should have the right to touch at any port or ports for coals was in direct contradiction to the condition that the ship should sail from Havana to Montreal direct, *via* the River St. Lawrence; that inasmuch as these two conditions were directly contradictory of each other, it was necessary to consider which of them should be disregarded, and as the description of the voyage was in writing and the permission to touch for coals was printed, the latter must be disregarded.

The appellant submits :

First.—That there is no contradiction between the two conditions in the charter-party. The vessel did not the less proceed direct from Havana to Montreal because she

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stopped at a port exactly on her route to take in a fresh supply of coal. This is not a deviation from her voyage within the meaning of the law. And in consenting that the ship should touch at a port or ports for the purpose of obtaining a supply of coals or other supplies, the charterer did not agree to anything contrary to the stipulation that the vessel should proceed direct to Montreal. A railway train does not the less proceed direct from Montreal to Ottawa because it stops at different points on the road for water or fuel. Nor does a steamer the less proceed direct from Montreal to Quebec because it touches at Sorel or Three Rivers. It would probably be considered a fair limitation of the charter-party, that under the permission to call at a port or ports for coal, the vessel should not go to a distant port, or to any port that would cause a serious deviation from her voyage, if any port existed on the line of her voyage where coal could be obtained.

But supposing the right of calling at a port for coal to be in some degree inconsistent with a rigorous construction of the exact phraseology of the previous condition of the charter-party, to proceed direct to Montreal, it cannot be denied that the charterer had a right, if he chose, to consent to a deviation to that extent from the most rigid construction of the previous phraseology. It is impossible to say that the two conditions are so essentially and absolutely opposed to each other, that they cannot co-exist; or that the contract cannot be considered unless one of them be excised from it. And if not, then it is certainly within the competency of either party to consent to relax, to some extent, the extreme strictness of construction which might be applied to any one of the conditions of the contract. Under the charter-party as it stands, this has been done in the most express terms. While on the one hand it is said that the vessel shall proceed from Havana direct to Montreal *via* the River St. Lawrence, on the other hand it is consented that she may stop on such voyage at a port or ports for coal or other supplies. This is the view which persons engaged in shipping business take of

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such conditions, as we find the consent to call for coals inserted *in writing* in the "Clandon" charter-party, although it might be held to be inconsistent with the description of the voyage, if the same rigid construction were applied to it as in this case. But if the question now under discussion had arisen on the "Clandon" charter-party, the Court could not have dealt with the permission as it has done in this case, because the permission as well as the description of the voyage is *in writing*. And the alleged rule of evidence as to disregarding printed matter when inconsistent with written matter, would not have been applicable to it. It would have been obliged to do as it should have done in this case, namely to read the whole contract together, and to read the permission to call for coal, as a qualification of the description of the voyage undertaken.

But as matter of fact the so-called rule of evidence does not even apply to the present case. Although it is true that the permission to call is in print, and the description of the voyage is in writing, yet the bill of lading which the respondents accepted from the Master, and on which their goods were carried contains a clause *in writing*, confirming the conditions of the charter-party of which the permission to call for coal is one. In order to reach the decision which the Court below rendered, it would therefore be necessary, not only to strike out of the charter-party what was left there by the contracting parties, but also to strike out of the bill of lading the condition in writing confirming, amongst others, the clause of the charter-party which the Court below decided should be disregarded. This seems to reduce the argument of the Court below to an absurdity, because it leaves the Court in the position of holding that a written condition overrules a printed one, although the printed one may be confirmed by a writing, as in this case. And it would scarcely seem necessary to pursue the discussion further.

But no such rule of evidence exists as that which was relied on by the Court below. It is true that a doctrine has been laid down in an insurance case that, where the

written and printed matter in an insurance policy are contradictory to each other, to such an extent that it is impossible to reconcile them, then preference should be given to the written one over the printed one. But the propriety of treating this ruling as a general principle or rule of evidence has been doubted and disputed in other English cases.

The true rule applicable in such questions undoubtedly is that of our own law, as well as the English law, namely, that the intention of the parties should be ascertained from the document itself by a fair consideration of the whole of its clauses, relatively to each other. And there is no difficulty in applying this rule to the present case. It is so obvious as scarcely to be susceptible of discussion or argument, that a vessel does not deviate from her voyage by calling at an intermediate port, lying in the track of her voyage, for necessary supplies. And the consent that the "Huntingdon" should so call is explicit, is not unusual, and is not inconsistent with a fair construction of the written portion of the contract. There is, therefore, no irreconcilable inconsistency in the terms of the contract itself. There is no difficulty in determining from the contract itself, as a whole, what the parties to it intended to agree to. And there is no need to seek for doubtful rules of evidence to justify the dangerous practice of excising from a contract signed by the parties, an important portion of the conventions it contains.

The difficulty of the respondents with reference to the increased rate of premium, which they allege they paid, arose from their own negligence in not acquainting the Insurance Company with the terms of the charter-party. The appellant is not in a position to say whether or no the custom or practice of insurance, or the contract between the respondents and the Insurance Company, justified such a charge; but it is plain that he can only be responsible for it if he has violated his agreement with respondents. So far from that, he acted upon that agreement according to its letter and its spirit, as confirmed by the bill of lading subsequently signed and accepted

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by the respondents. If the respondents had communicated the charter-party to the Insurance Company, no question of increased premium would have arisen. The Insurance Company would have named the premium as applicable to the voyage described in the charter-party.

The appellant therefore respectfully contends that the judgment of the Court below was erroneous and should be reversed:

1st—Because by the express terms of the charter-party the ship was entitled to call at Sydney for coal.

2nd—Because the terms of the charter-party were subsequently confirmed by the bill of lading, signed by the master of the vessel, and accepted by the respondents.

3rd—Because the conditions of the charter-party describing the voyage are not inconsistent with the condition permitting the steamer to call at Sydney for coal.

4th—Because there is no rule of evidence or law authorising the Court to disregard the condition of the charter-party allowing the ship to call for coal at an intermediate port.

5th—Because the alleged rule of evidence stated by the Court below does not apply to the present case, inasmuch as the conditions of the charter-party are confirmed by the bill of lading, which is in writing and not in print, and is binding on the respondents.

N. W. Trenholme for the respondents :—

The Court will see by the charter-party that the voyage which the parties agreed upon was clearly and expressly described *in writing* as one from Havana, Cuba, "to Montreal *direct, via* River St. Lawrence." This means, and can only mean, a voyage, as Mr. Justice Papineau states, *direct* from the one port to tho other, without calling at any intermediate port, and is not answered by the voyage appellant actually made.

The voyage the vessel made is a very different voyage, as the vessel sailed *via* and called at the intermediate port of Sydney. The voyage she made is shown by the Clearance, which is as follows :—

"I, Arthur de Capel Crowe, Her Britannic Majesty's

"Consul-General in the Island of Cuba, do hereby certify "that the British steamship called the 'Huntingdon,' "commanded by Captain John Peters and manned with "29 seamen, and no passengers, making in all 30 persons, "has this day cleared out from the port of HAVANA, bound "for MONTREAL *via* SYDNEY, C. B., with a cargo of sugar; "and that in this city and port there are some cases of "yellow fever not considered epidemic.

"Havana, June 7th, 1883.

"(Signed,) A. DE C. CROWE,
"*H. B. M. Consul-General.*"

The respondents claim that appellant had no right whatever to clear *via* Sydney and call at that port as he did for coals; no unforeseen accident or stress of weather having occurred to necessitate his doing so, and by the charter-party and by law appellant was bound to have a sufficiency of coal on board at the outset for the whole voyage; 2 Parsons, p. 373; 13 Mass. Rep. 68.

The appellant invokes the following printed clause of the charter-party, viz: "Steamer to have liberty to tow "and be towed, and to assist vessels in all situations, also "to call at any port or ports for coals or other supplies."

The respondents submit:—

1st. That this clause only refers to the case of necessity; and

2nd. That if it does of itself necessarily mean that appellant had a right to call at a port without any necessity for his doing so, it is in direct contradiction to the written clause describing the voyage and must yield to it.

The Court will observe that the clause invoked is one of the printed clauses of a printed form, and the words "steamer to have the liberty to tow and be towed, and "to assist vessels in all situations," shew that this clause is intended to refer to cases of necessity, and is little more than a *banal* clause to avoid doubt.

It will hardly be pretended that under this clause the vessel could, for instance, voluntarily have taken another vessel in tow from Havana to Montreal as a mere specu-

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lation and without there being any necessity so to do. It is fair to assume that the balance of this clause on the principle of *ejusdem generis* applies also to a case of necessity arising from unforeseen events.

Similar clauses, which simply state what the law itself permits or implies, are of the commonest occurrence in the printed forms; as for instance in this very charter-party itself, we have examples of the same *banal* clauses. Thus the printed stipulation that the captain shall receive and stow the cargo with due care, is simply the law as embodied in Art. 2448 C. C., and the other printed stipulation, that the vessel shall have a lien for freight, is simply the law as stated in Art. 2409 C.C. We have another example in the policy of insurance filed, in which is the following almost similar clause, viz.:—"And it shall " and may be lawful for the said vessel, in her voyage " to proceed and sail, to touch and stay at any ports or " places, if thereunto obliged by stress of weather or other " unavoidable accident, without prejudice to this insu- " rance." All these are mere statements of the law on the subject. There is, therefore, nothing in the argument that some effect must be given to this clause; sufficient effect is given to it to satisfy the requirements of such printed forms when it simply states the result of the law. 2 Dem. Con. Nos. 13 and 14.

Such general printed clauses are of the feeblest effect. But it matters not if the printed clause invoked by the appellant does mean what he contends it does, it certainly must yield to the express written clause, that the voyage shall be a *direct* one. All the authorities are agreed on this point. Emerigon Ass. vol. I, ch. 2, s. 3, p. 34, *par Boulay-Paty*, states the undoubted rule of law on the subject, he says :—"Il est permis de déroger au clauses " imprimées, *et on* est censé y déroger *par cela seul que les* " *clauses écrites à la main y sont contraires.*"

May, Ins. Sec. 177, is substantially to the same effect; he says :—" *Written, over printed words prevail.* As in all con- " tracts consisting partly of printed matter and partly of " written, so with contracts of insurance where any des-

" crepancy or repugnancy exists, the written portion is to " prevail over the printed, for the obvious reason that the " latter contains the more general and formal provisions " applicable for the most part to all cases, there is more " ground for supposing that these *have not been erased* or " *modified* so as to conform to the written portion through " inadvertance, than that the special and peculiar provi- " sions of the written portion have been adopted with- " out due consideration, and inserted without the design " or contrary to the intention of the parties." *Vide* also 1 " Greenleaf sec. 278. Taylor Evidence, sec. 1033; 22 N.Y. 443; 36 L.T., N. S. 252; 4 East, 135.

That the voyage made by appellant was a direct voyage from Havana to Montreal will hardly be pretended. The defendants' witnesses admit it was not, and that an extra premium would be fairly payable for calling at Sydney. Emerigon Ass. Vol. 2, p. 63—*par Boulay-Paty*, says: " Il " n'y a pas de doute qu'il y a prévarication de la part du " capitaine, s'il ne suit pas la route directe du voyage as- " suré, s'il allonge son voyage, s'il entre *sans necessité* dans " quelque port que ce soit, fut-ce même un port du " royaume, quoique sur *sa route*."

Vide also 3 Kent 331,* and *Elliot* v. *Wilson*, 7 Bro. P. C. 459. Kent says, "The shortness of the time or of the dis- " tance of the deviation makes no difference as to its effect " on the contract; if voluntary and without necessity, it is " the substitution of another risk and determines the con- " tract. So strictly has this doctrine been maintained, " that where a vessel, having liberty in sailing down the " Frith of Forth to touch at Leith, touched at another port " in its stead, equally in her way, it was held to be a fatal " deviation, though neither risk nor premium would have " been increased if it had been permitted." In the present case, even appellant's witnesses admit both risk and premium were increased by calling at Sydney over that due for the direct voyage.

Another pretention raised by the appellant, is that the voyage he made was justified by usage of trade. Respondents reply:—1st. That if such usage were proved, it

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would have to yield to the express written stipulation between the parties, and 2nd. That no such usage was properly pleaded, so as to give respondents a chance to meet the same, and that there is no proof to support such usage, but the contrary. A usage of that kind, to be available in cases where usage may be invoked, must be a usage so notorious that the parties must both be necessarily presumed to know of it, and it is needless to say that no such usage is proved in this case ;—*Vide* Abbott, Shipping, 12th Ed. p. 210. Maclachlan, Shipping, 3 Ed., p. 425.

That respondents had an interest in paying the extra premium is certain, as it was done before it was ascertained whether any damage had been done to the cargo or not, and before the vessel had arrived at Montreal.

RAMSAY, J. (*diss.*) :—

This was was an action for freight due on the charter-party of the steamship Huntingdon. The action was met by a plea setting up that the charter-party was for a direct voyage from Havana to Montreal *via* River St. Lawrence : that the vessel had cleared for Montreal by way of Sydney, and had actually entered the harbor of Sydney ; that this deviation becoming known to the defendants' insurers, they had demanded an increased premium for the extra risk, which the charterer had paid, and he contends that the owner is liable for this extra charge, which should be set off against so much of the freight. Plaintiff and appellant answers that by a clause of the charter party, the ship had the right to put into any port or ports for coal and supplies, and that in going into Sydney, the master had only exercised the privilege accorded to him under this stipulation.

The facts of the case are these : The contract of affreightment is drawn on a printed form, with blanks to be filled up in writing to meet the intention of the parties. In other words, the banal clauses are printed, the particular ones are in writing. In describing the voyage, the written stipulation is that it shall be direct from Havana to Mon-

treal *via* the river St. Lawrence. A printed clause near the end of the deed is in these words: "Steamer to have "liberty to tow and be towed, and to assist vessels in all "situations; also to call at any port or ports for coal or "other supplies." It is not seriously contended that entering a port not named is not a deviation from a direct voyage, so that if the printed clause quoted did not exist, there could be no doubt that entering the port of Sydney without the justification of necessity would have been a deviation. It seems equally clear that if this unnecessary deviation caused a damage to the charterer, he would be entitled to receive indemnity from the owner, and to set it off against the freight. Extra insurance paid in consideration of the increased risk is, it seems, such a damage as could be so set off. Lord Ellenborough, in the case of *Bowman* v. *Tooke*, 1 Camp. 377.

But appellant says, that there being two clauses to some extent contradictory, they must, if possible, be read together, so as to give meaning to both, and that although, strictly speaking, by entering an intermediate port, a voyage ceases to be direct in the most technical signification of the word, the real intention of the parties to the contract was that the voyage should be direct from Havana to Montreal, *via* the River St. Lawrence, subject to the right of the owner to enter any port on the way for coals or other supplies, and that, in this case, no more was done.

On the other hand, respondent contends that the word direct has a well known technical signification, which precludes the idea of its being intended to make the voyage with voluntary stoppages at intermediate ports for any purpose. He says that the right to stop for coal and other supplies is only a clause of a general character enunciating a rule of marine law, and that, if it means anything more, it is in positive contradiction to the special description of the voyage, and that being printed words, the presumption is that the written words expressed the real intention of the parties, and that the printed clause was left inadvertently. It appears to me that, as a ge-

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neral rule of interpretation, the written clause which is irreconcilable with a printed clause in the same deed, must prevail in the absence of any evidence to destroy the presumption upon which this preference is based. The case of *Jessel* v. *Bath* illustrates this perfectly, L. R, 2 Ex. 267. There the printed words prevailed over the written ones, because the written words said what was not, and could not be true. Of course, it is the duty of the Court to interpret a deed so as to give effect to every clause if possible, and in doing this, to use one clause of the deed to explain the other, although it may be necessary to restrict the generality of one of them. This is the principle appellant invokes, but it is not really what he desires us to do. He asks the Court to restrict the written term "direct," so as to destroy it completely, by allowing him to clear for any port or ports he pleases, provided, in fact he only takes in coals or supplies. There might perhaps be something to say for this mode of dealing with the terms of the deed, if there was no other interpretation possible, but a perfectly satisfactory one is offered. The written description of the voyage should be taken exactly as it stands, the printed one is a clause enunciating the common law *ex cautela*. There is an objection to appellant's position which struck me at the argument. It was this, that what was done, does not accord with the terms of the printed clause relied on, which generally allows to call, not at Sydney, but at any port or ports for coal, and this the owner converts into an express provision to clear for Montreal *via* Sydney. If he could do this under the charter-party, he might have cleared for Montreal *via* Halifax, Sydney, Quebec or Sorel, where coal or supplies could be procured. It was said this would not be reasonable. If it was the owner's right, and he could make a profit by doing so, it was just as reasonable in one case as in the other.

I have only to make one other observation. It is a rule of interpretation and one relied upon by appellant, that an ambiguous clause is to be interpreted by the other clauses of the same deed, whether coming before or

after (Pothier, Obl. No. 96.). Now, the owner agrees that the ship is to proceed with all despatch direct to Montreal, yet we are to say that he may stop at any port or ports he pleases on the way, provided he only takes in coals or supplies. He warrants that his ship is fully fitted, and yet he contends he has a right deliberately to start on his career without sufficient coals or supplies. Again, I think, it must be evident, that the generality of the power to stop at any port or ports, shows that it was where necessity, not calculation, should determine. If it was intended he was to coal at Sydney, because it was the usage to call there, why not put it in the deed? The interpretation suggested by appellant appears to me to conflict with another rule—that where a clause is susceptible of two meanings, it is to be interpreted in the sense most suitable to the nature of the contract. Pothier, Obl. 93. It is certainly not in the nature of the contract of affreightment to multiply indefinitely the risks of the voyage.

Since I prepared this opinion, my attention has been drawn to three cases. The first I shall advert to is *Scaramanga & Company & Stamp et al.*, 28 Weekly Reporter, 691. It was a case for loss of cargo of a ship which, without authority by the charter-party, deviated from its course to tow a ship to Texel, in order to gain £1,000 promised as salvage. The court held this was not a defence at common law, and Lord Bramwell said, "It is certain that no law orders "such a deviation; it is certain there is no usage which "adds to the contract a power to deviate for such cause;" "and he added, "on the contrary, every opinion is "against it, and it is certain that ships that desire to have "such a power, or one somewhat like it, expressly stipulate for it, as, for example, for the right to tow vessels." I trust it will not be supposed that my opinion deviates from that expressed in this case, but I cannot see its application to the matter in hand. The next case is *Stuart & The British and African Steam Navigation Company*, 32 Law Times, 257. It was there held that a clause giving "liberty to tow and assist vessels in all situations," neces-

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sarily included the liberty so to do. Mr. Benjamin, who argued the case for the defendants, admitted that such a clause must have a limitation, in cases within its terms, —however, he declined to define the limitation, the case then before the court being clearly within the power, and Lord Bramwell agreed with him, that there were cases within its terms to which it would not extend, and he intimated that Mr. Benjamin was right in not going into a consideration of such exceptional cases. The verdict was entered up for the defendants. I am disposed to think that the general meaning of that case supports my opinion, for it holds that totally unambiguous words in a clause of this sort will be limited. How much more then should we be justified in limiting a general clause of this sort when it is incompatible with other clauses of the charter-party.

The third case is *Wingate & Co.* v. *Foster*, 26 Weekly Rep. 650. It was on a policy of insurance, and consequently so far, more akin to this case. The insured, owners of steam-pumps, took out a policy on them on the Sea Mew at and from Ardrossan to the wreck of the Alexandria, near Drogheda, and whilst there engaged at the wreck, and "until again returned to Ardrossan," and it was held that the policy did not cover a voyage to Belfast with the wreck, although Belfast was the most proper and convenient port of refuge. This, then, has no influence on the case before us, but to show how strictly deviation is considered.

In order to avoid misconception, having to speak first, I must reiterate my opinion categorically, that in a voyage direct from Havana to Montreal, *via* River St. Lawrence, the words "steamer to have liberty to *** call at any "port or ports for coals and (f) or other supplies," do not expressly give the right to clear generally *via* Sydney, and that this is not affected by the fact that the ship insured only took in coal; and further, that a ship, "in every way fitted for the voyage (namely, from Montreal direct, *via* River St. Lawrence), is not justified by these words in omitting to take sufficient coal for the voyage, unless it

be established that there is a usage of trade permitting vessels in such a voyage to coal at some particular place.

The only difficulty that appeared to me in the case was that the policy did not pursue precisely the terms of the charter-party; but it is not pretended, nor does it appear that the claim of the insurance company for extra premium would have existed if the steamer's supply of coal had failed from any unforeseen cause. I am, therefore, to confirm.

CROSS, J.:—

The appellant sues the respondents for a balance of freight due under a charter-party of the steamer "Huntingdon," for a voyage from Havana to Montreal.

The respondents do not dispute the claim for freight, but set up a counter claim for $328.98, which they allege they were obliged to pay, as an additional or increased rate of premium, because the steamer had, without right, and contrary to the conditions of her charter party, deviated from her voyage by calling for coal on her way from Cuba to Montreal.

The charter-party described the voyage as being to Montreal direct *via* the River St. Lawrence, and contained, among others, a printed condition that the steamer "shall "have liberty to tow and be towed, and assist vessels in "all situations, also to call at any port or ports for coal or "other supplies." The voyage is therein described as being to Montreal, direct, *via* the River St. Lawrence, and the charter contains the usual declaration that the steamship was tight, staunch and strong and in every way fitted for the voyage.

The steamer called at the port of Sydney, Cape Breton, for what is usually called bunker coal, that is, coal for the use of her engines, and the Atlantic Mutual Insurance Company, with whom the respondents had the cargo insured as for a voyage direct from Cuba to Montreal, took, that is, advantage of this fact, as they were possibly justified in doing by the rules of their office, to charge an additional premium, which the respondents claimed they had a right

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to deduct from the freight as being a damage caused to them.

It appears to be clear, as matter of fact, that although a vessel may call at Sydney on her way from Havana to Montreal, the voyage must necessarily, nevertheless, be a voyage *via* the St. Lawrence, and so little is the port of Sydney out of the way of vessels by that route that it requires but an inconsiderable divergence to enter that port, so that, save the entrance to the port, the voyage is the direct voyage from Havana to Montreal, *via* the River St. Lawrence, and the vital question is whether the steamer had a right, under the terms of her charter-party, to call at the port of Sydney for bunker coal.

The learned Judge of the Superior Court was of opinion that the description of the voyage, as direct, from Havana to Montreal, *via* the River St. Lawrence, was contradictory of the condition in the charter-party, whereby it was declared that the steamer had liberty to call at any port or ports for coals or other supplies, and that the two clauses being inconsistent, and the first being in writing, while the second was printed, the written clause should prevail over the printed, which latter should be rejected, and, as a consequence, the steamer should be considered as having, without right, deviated from her direct voyage, by calling at Sydney, and the additional premium, which the respondents had thereby been obliged to pay was a legitimate claim for damage the respondents had been put to by this deviation, for which they were entitled to be indemnified by the appellant, to be deducted from his claim for freight.

The majority of this Court does not take the same view of the case as was done by the learned judge of the Superior Court. The majority of this Court is of opinion that calling at the port of Sydney for coal was no deviation from the direct voyage from Havana to Montreal, other than was authorized by the terms of the charter-party; that there is no contradiction in the clauses cited from the charter-party; that the clauses in question should be read and construed together, and in such manner as to give effect

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to the whole, and that, although a written clause would supersede a contradictory printed clause to the extent of the actual contradiction, there is no room here for the application of this rule, inasmuch as the liberty to call for coal was a mere qualification, not a contradiction of the voyage being direct, that is, it was direct, subject to this exception, and so the document should have been read. The declaration that the vessel was in every way fitted for the voyage, did not contradict or exclude the exception in the charter that she was at liberty to call at an intermediate port for coal. The exception implied that the calling for coal was a convenient incident of the voyage which the ship might avail herself of, and a presumption that a full provision of coal at Cuba for the whole voyage might be inconvenient, and not a necessity; that a vessel was sufficiently found and provided for a voyage when she had such supply of coal as suited the route, a complement being more suitably obtained at a call port where she reserved liberty to stop for a supply, besides which, it was the duty of the charterer, in order to protect himself, to have insured according to the terms which he had agreed to by the charter, making the same exception in the policy as was contained in the charter.

We consequently conclude that the judgment of the Superior Court should be reversed, and the appellant should have judgment for the balance of freight claimed, without deduction of the extra premium of insurance.

Besides the authority of the three cases commented on by the learned judge who dissents, and which I consider fully support the appellant's pretensions, the liberty to call at a port not named is well explained in I Parsons, Maritime law, p. 20, and the question as to the exception in the charter by the authorities cited by the appellant.

DORION, CH. J. :—

I will only add one word. The clause which allowed the ship to stop at any port for coal, authorized it to stop in any reasonable way. Now there was nothing unreasonable in stopping at Sydney. I think the deviation was

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justified by the terms of the charter-party, and that the master was entitled to exercise his discretion in the way he did.

The judgment of the Court is recorded as follows :—

" Considering that the appellant has proved that at the time of the institution of the present action there remained due and owing to him by the respondents a balance of $380.60 for the carriage of goods of the respondents by the appellant in his steamship Huntingdon, on a voyage from Cuba to Montreal, under the charter-party dated the 26th May, 1883, mentioned in the pleadings in this cause, for the recovery of which balance the present action has been brought;

" Considering that the respondents have failed to prove the material allegations of their plea, more particularly that the calling by the said steamship at the Port of Sydney for coal in the course of the said voyage, was a deviation therefrom other than permitted by the said charter-party, or that the increased premium of insurance exacted from them in consequence of said calling was chargeable to any default, neglect, or breach of contract on the part of the said appellant, or that there was any provision in said charter-party inconsistent with, or contradictory of the clause, therein contained, giving the said steamship liberty to call at any port or ports for coals, or that the respondents had any valid claim on the appellant to be indemnified for said extra premium of insurance;

" Considering, therefore, that there is error in the judgment rendered in this cause by the Superior Court at Montreal, on the 29th of February, 1884;

" The Court of our Lady the Queen now here doth cancel, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth adjudge and condemn the respondents to pay and satisfy to the appellant the sum of $380.60, with interest thereon, &c."

Judgment reversed (RAMSAY, J., *dis.*)

Abbott, Tait, Abbotts & Campbell, attorneys for appellant.

Trenholme, Taylor, Dickson & Buchan, attorneys for respondts.

(J. K.)

February 21, 1884.

Coram DORION, CH. J., MONK, RAMSAY, CROSS, BABY, JJ.

ALEXANDER B. ALMOUR,
(*Defendant in first instance*),
APPELLANT;

AND

CHARLES E. HARRIS,
(*Plaintiff in first instance*),
RESPONDENT.

Prescription— Promissory note— Interruption—Foreign judgment—C. S. L. C., ch. 90.

HELD:—That a judgment obtained in a foreign country upon a promissory note made therein has the effect of interrupting prescription.

The appeal was from a judgment of the Court of Review, Montreal, Feb. 28, 1883 (RAINVILLE, PAPINEAU, JETTÉ, JJ.), which reversed a judgment of the Superior Court, Montreal, Oct. 31, 1882 (TORRANCE, J.). The decision of Torrance, J., is reported in 5 Legal News, 376.

The respondent, plaintiff in the Court below, set up that a judgment had been obtained in Nova Scotia upon a promissory note, and the amount thereof was claimed from defendant appellant.

The defendant demurred, on the ground that the judgment had not the force of *chose jugée*; and he also pleaded that the note which formed the basis of the action, was prescribed.

The demurrer was dismissed by JETTÉ, J., Sept. 20, 1882, by the following judgment:—

"La Cour, etc.....

"Considérant que les jugements rendus en pays étrangers, bien qu'ils n'aient pas force de chose jugée et ne soient pas exécutoires dans la province, peuvent néanmoins être valablement invoqués au soutien d'une demande en justice;

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"Considérant que dans l'espèce, le demandeur n'allègue pas le jugement par lui invoqué à d'autres fins, et que, par suite, sa demande, quant à ce, est bien fondée en droit;

"Renvoie la dite défense en droit avec dépens; distraits, etc."

The plea of prescription was maintained by TORRANCE, J., by the following judgment (Oct. 31, 1882):—

"Considering that defendant hath proved his plea of prescription against the note sued upon in this cause, and the judgment of the Supreme Court of the province of Nova Scotia invoked by plaintiff has not interrupted said prescription;

"Doth maintain said plea and dismiss said plaintiff's action with costs, distraits, etc."

The case was then taken to Review, where the following judgment was rendered, Feb. 28, 1883 (RAINVILLE, PAPINEAU, JETTÉ, JJ.):—

"La Cour, etc.....

"Attendu que le demandeur réclame du défendeur la somme de $662.53;

"Attendu qu'il allègue qu'à Halifax, province de la Nouvelle-Ecosse, le onze février, 1875, le défendeur a fait son billet payable à T. R. Harris, ou ordre à 90 jours de date, pour la somme de $350.00, lequel billet le dit T. R. Harris lui a transporté par endossement; que ce billet a été présenté pour paiement à son échéance au lieu où il était fait payable, et qu'il n'y a pas de provision; que les intérêts accrus sur le dit billet sont de $194.67; que le demandeur a poursuivi le défendeur devant la Cour Suprême de la Nouvelle-Ecosse, le 18 mai 1874, en recouvrement du dit billet; que le défendeur a plaidé à l'action et que par jugement rendu par la dite Cour, il a été condamné à payer au demandeur la somme de $385.54 avec frais de $82.32, formant les dites sommes réunies, celle de $662.53;

"Attendu que le défendeur a plaidé par une défense en droit, laquelle a été déboutée par la Cour de première instance et qu'il y a en ce bien jugé: attendu que le dé-

fendeur a plaidé que le billet qui fait la base de l'action est prescrit et l'était lors de l'institution de l'action ;

" Attendu que la Cour de première instance a maintenu la dite exception de prescription ;

" Considérant que le jugement étranger invoqué par le demandeur paraît avoir été rendu entre deux étrangers et résidant alors dans la juridiction de la Cour qui a rendu jugement ; considérant que ce jugement d'après nos lois constituait chose jugée entre les parties, avant le statut 23 Victoria, chapitre 24 (S. R. B. C. ch. 90, s. 1) ;

" Considérant que le dit statut ne donne qu'un droit à un défendeur poursuivi dans une action intentée en vertu de jugements étrangers, savoir : de plaider les moyens invoqués dans l'action sur laquelle le jugement invoqué a été rendu ;

" Considérant que le défendeur n'aurait pas pu dans la première action invoquer le moyen de la prescription en autant qu'elle n'était pas alors acquise, ou dans tous les cas, qu'il ne le fait pas voir, et qu'en conséquence il y a erreur dans le dit jugement du 31 octobre, 1882 :—Casse, annule et renverse le dit jugement, et procédant à rendre celui qu'aurait dû rendre la dite cour de première instance, déboute le défendeur de son exception de prescription, et considérant que le demandeur a prouvé les allégations de sa déclaration ;

" Condamne le défendeur à payer au demandeur la dite somme de $662.53, etc."

PAPINEAU, J., (in Review) :—

L'action du demandeur est fondée sur un jugement ou décret de la Cour Suprême de la Nouvelle Ecosse, en date du 22 de décembre, 1876—pour le montant de ce jugement, l'intérêt dû sur le capital du jugement et les frais de ce jugement. Le demandeur allègue que ce jugement avait été prononcé par la Cour Suprême de la Nouvelle-Ecosse, dans une poursuite intentée le 18 de mai 1875, pour recouvrement d'un billet daté du 11 de février 1875, pour la somme de $350, payable à 90 jours.

Le défendeur a rencontré cette demande par une défense

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en droit, que la Cour de première instance a renvoyée, et par une exception de prescription dans laquelle il dit qu'il n'a fait aucune affaire avec le demandeur en cette cause en aucun temps, et qu'il n'en a pas fait avec le nommé T. R. Harris, à l'ordre de qui le billet en question a été fait, depuis la date de ce billet, 11 février 1875.

Que ce billet est prescrit, et l'était depuis longtemps avant l'institution de la présente action.

Le demandeur a été débouté de son action. Les motifs de ce jugement sont, 1o. que le défendeur a prouvé son plaidoyer de prescription contre le billet sur lequel la poursuite a été faite.

2o. Que le jugement rendu par la Cour Suprême de la Nouvelle-Ecosse, n'a pas eu l'effet d'interrompre la prescription du billet en question.

De là la demande de révision.

Le défendeur, au soutien de ce jugement, pose comme base de son argumentation que ce jugement, obtenu dans la Nouvelle-Ecosse, est pour nous un jugement obtenu à l'étranger, chap. 90 stat. R. B. C.

Les deux parties s'accordent sur ce point. Le défendeur pose encore en principe, qu'il n'y a qu'une demande régulière, en justice, formée devant un tribunal compétent, qui interrompe la prescription, toute autre demande étant impuissante à le faire. C. C. Art. 2224 et 2225.

On peut dire que les deux parties et la jurisprudence admettent encore cette proposition.

Le troisième point, énoncé par le défendeur, est celui où la divergence commence entre les parties. Le voici, tel qu'énoncé dans son factum, avec autorités citées à l'appui : " la demande devant un tribunal étranger est " sans effet ici ; elle ne peut ni établir chose jugée, ni " avoir aucun effet," S. R. B. C. chap. 90.

10. Toullier, Nos. 76, 77, p. 113, Merlin, Rep. Vo. Jugement §§ VI, VII ; Id. Questions de Droit Vo. Jugement § 14 ; Idem Rep : Vo. Testament § 2, § 3, Art. 8, Idem Vo. Souveraineté § VI.

Le demandeur admet que les jugements étrangers n'ont pas ici force de *chose jugée* ; mais il ne peut admettre la proposition qu'ils sont sans effet ici.

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Il soutient que, par l'article 1220 du Code Civil, paragraphes 1 et 2, un jugement étranger, revêtu du sceau de la cour qui l'a rendu, ou de la signature de l'officier ayant la garde du dossier de tel jugement, fait preuve *prima facie* du contenu de tel jugement, à tel point que, pour forcer la partie qui l'invoque à en faire la preuve, il faut que l'autre partie fasse une dénégation accompagnée du cautionnement et de l'affidavit requis par l'art. 145, Code Procédure Civile.

Que le défendeur, n'ayant pas fait telle dénégation, le contenu du jugement en question est définitivement prouvé ; or le jugement constate la citation en justice ou assignation du défendeur, la demande de paiement du billet, le défaut de paiement et la condamnation dans la Nouvelle-Ecosse.

Il en tire la conséquence que cette citation en justice prouvée, irrévocablement, quant à nous, puisqu'elle n'a pas été niée, a eu pour effet d'interrompre la prescription, et de faire qu'à compter de ce jugement il n'y a plus d'autre prescription que celle de 30 ans à opposer à la créance. Il cite à l'appui de cette prétention le Code Civil, art. 2224 ; Code Napoléon, art. 2244 ; Bourjon, tome 2, p. 571 ; Dalloz, 1835, 2nde P., p. 127 ; Laurent, tome 33, p. 175 ; et C. C., art. 2265.

Le demandeur soutient que la loi lui donne droit de demander en justice ici qu'un jugement étranger soit rendu exécutoire dans ce pays et que s'il n'est pas nié, de la manière prescrite par l'art. 145 du Code de Procédure, il passe en force de chose jugée, et il cite à l'appui le statut 16 Vict., chap. 198, sect. 1re et suivantes ; et le Stat. Ref. B. C., chap. 90, sect. 1re et suivantes, qui en reproduit les dispositions. Il cite aussi la cause de *King* v. *Demers* rapportée au 15e vol. L. C. Jurist, p. 129, décidée par Cour de Révision, composée des juges Mackay, Torrance et Beaudry.

L'acte 16 Vict., chap. 198, sec. 1re, dit : " Attendu que " l'admission comme preuve de certains jugements et do- " cuments officiels et publics étrangers..... diminuerait " considérablement les frais de la procédure et faciliterait

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" grandement les moyens d'obtenir justice, dans le Bas-
" Canada; " et statue qu'une expédition de tout jugement, etc..... sera offerte dans toute cour de justice comme preuve *prima facie* de tel jugement.

L'acte 23 Vict., chap. 24, sect. 1re, va plus loin; il fait d'un jugement étranger un titre de créance en vertu duquel on peut intenter une action dans le Haut ou dans le Bas-Canada, puisqu'il y est expressément statué que dans " toute action intentée dans l'une ou l'autre section de la " province, en vertu de jugements ou décrets rendus par " des tribunaux étrangers..... les moyens de défense " invoqués ou qui auraient pu être invoqués dans la 1re " action pourront l'être à l'égard de *l'action fondée sur tel* " *jugement ou décret.*"

Le chapitre 90 des Statuts Refondus a reproduit textuellement cette disposition.

Le fait qu'il est permis d'opposer à ce nouveau titre de créance les moyens de la défense invoqués, ou qui auraient pu être invoqués, dans la première action, n'empêche pas le jugement d'être la base de l'action intentée en second lieu puisque la loi dit expressément que celle-ci, la seconde, est fondée sur tel jugement.

La loi fait une distinction entre la base de la première action et celle de la seconde: dans la première, c'est le lien primitif entre les parties qui reste assujetti aux divers modes de preuve orale, sous seing privé, ou authentique, suivant le cas; dans la seconde, le jugement rendu sur la première action est la base de la poursuite, et il est une preuve *prima facie* et presque authentique de l'existence du lien en vertu duquel la seconde est intentée. Cette preuve a un poids tel, aux yeux du législateur, qu'il n'exige pas moins qu'une dénégation, accompagnée d'un cautionnement suffisant, pour rencontrer les frais d'une commission rogatoire, avant d'obliger la partie qui l'invoque à fournir une autre preuve.

La prétention du défendeur qu'un tel jugement est sans effet ici n'est donc pas fondée.

Notre loi faisant d'un jugement étranger le fondement d'une action ici, n'est pas exactement semblable au Code français, et les autorités des commentateurs ou juriscon-

sultes qui ont écrit sur le Code Napoléon ne doivent pas être accueillies avec la même faveur que s'il y avait similitude parfaite entre les deux législations. L'ancien droit français n'est pas entièrement applicable non plus, puisque nous avons des statuts qui l'ont considérablement modifié.

Dans notre système, c'est le jugement étranger qui devient le fondement de l'action quoiqu'on puisse plaider les moyens de défense qu'on aurait pu plaider dans la première poursuite ; or nos lois n'établissent aucune prescription de moins de trente ans, contre un jugement, qu'il soit rendu dans le pays ou à l'étranger. On ne peut donc pas invoquer la prescription de cinq ans, contre le jugement. On ne peut pas l'invoquer non plus contre le billet qui a fait la base de la première action, parce que celle-ci ayant été intentée peu de temps après l'échéance du billet, la prescription de cinq ans n'est pas un moyen qui aurait pu être plaidé dans la première action.

Le jugement étranger n ayant pas été attaqué, suivant les prescriptions de notre code, est devenu un titre authentique de créance et le défendeur, qui, en vertu de ce titre, est débiteur, aurait dû être condamné.

Le jugement doit être et il est renversé. Le demandeur obtient jugement, suivant ses conclusions, avec dépens tant de la Cour de Révision que de la Cour de première instance.

January 26, 1884.] *Pagnuelo, Q. C.*, for the appellant.

M. Hutchinson for the respondent.

DORION, Ch. J., rendered the judgment in appear, unanimously affirming the judgment of the Court of Review, and holding that under the circumstances prescription was interrupted.

Judgment of C. R. confirmed.

Pagnuelo & St-Jean, attorneys for appellant.

Macmaster, Hutchinson & Weir, attorneys for respondent.

(J. K.)

September 21, 1886.

Coram MONK, RAMSAY, TESSIER, CROSS, JJ.

ALBERT NORDHEIMER ET AL.
(*Plaintiffs in Court below*),
APPELLANTS;

AND

OLIVIER LECLAIRE ET AL.
(*Defendants in Court below*),
RESPONDENTS.

Judicial sale of moveables—Irregularities—Nullity—Revendication of thing sold.

HELD (Reversing the decision of GILL, J., M. L. R., 2 S. C. 11):—That a judicial sale of moveables may be set aside for irregularities in the proceedings as well as for fraud and collusion; and where a piano not the property of defendant was seized and sold as belonging to him for an insignificant part of its value, and the owner had no knowledge of such seizure, and it further appeared that there was no bidder at the sale, except the person who purchased the piano, it was held that the sale was a nullity, and that the owner was entitled to revendicate the property.

The appeal was from a judgment of the Superior Court, Montreal, (GILL, J.), May 27, 1885, dismissing an action of revendication. The judgment appealed from is reported in M. L. R., 2 S. C. 11.

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T. P. Butler, and *C. A. Geoffrion*, Q. C., for the appellants, relied upon evidence of fraud and collusion. Further, it was submitted that fatal irregularities had been committed, legal formalities had not been observed, and the articles seized had been adjudged precipitately to Leclaire alone *à vil prix*, he being the only bidder, and purchaser of all the effects sold, for $12, including the piano revendicated, which was valued at $300.

L. O. David for respondent Olivier Leclaire.

C. Lebeuf for respondent Connolly.

J. J. Beauchamp for respondents Rodden.

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RAMSAY, J.:—

This case is somewhat peculiar. Its peculiarity consists, not in the desire to appropriate the property of others, on every sort of pretext, for that is very common, but in the extraordinary audacity of the pretentions of two of the parties respondent. Connolly, one of the respondents, obtained judgment against Richard Rodden, another of the respondents, for about $7, and in execution of this judgment, seized, amongst other things, a piano as being the property of the defendant. As a fact, the piano belonged to appellants, and was leased to a son of Rodden, who inhabited the same house as his father and his family, and there the piano was seized. This seizure took place at Côte St. Antoine, and the publication was made at the church door, near the canal. Probably this publication was sufficient; but, as a matter of fact, appellants knew nothing about it. Rodden and his son did not consider it to be their duty to inform the owners of the piano that this valuable piece of furniture, which had been entrusted to the care of the latter, was to be sold to pay the debt of the former. But, curious to say, in a very formal manner they notified Connolly that he had seized a piano and other property which did not belong to the defendant. To this notification, Connolly paid no attention. He, however, thought it prudent to send for the bailiff to tell him to see that there was an audience. The bailiff so far conformed himself to this recommendation as to induce a dealer in second-hand furniture, named Leclaire, to accompany him to the scene of operations. Being there, the bailiff, without any other audience then Leclaire, his *recors*, and the members of Rodden's family, sold this piano for a sum insufficient to meet this small judgment and costs, and some other articles of defendant's furniture were sold to make up the sum required.

The appellants, owners of the piano, by *saisie-revendication*, seek to recover possession of their property, calling in the four parties mentioned.

Sales by authority of justice, *par décret*, can be set aside for irregularity in the proceedings, and for fraud, as every

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other transaction under our law. After speaking of the vice of fraud as a reason to set aside deeds, d'Aguesseau adds : " *La solennité du décret ne change rien à ces principes.*" And so it was decided in this court nearly thirty years ago in the case of *Ouimet et al. & Senécal et al.*, and the fraud was held to be fully established by evidence of secrecy on the part of the defendants, exceptional modes of procedure, *villité de prix*, that the action was by a workman in the employment of defendants, who was aware of the condition of matters, and that the *adjudicataire* was a brother of defendant, and also knew he was buying what did not belong to defendants.

We have not, however, in this case to consider the question of fraud, for the majority of the court is of opinion that the sale *à vil prix*, and without an audience, as in this case, the piano being sold for an insignificant fraction of its value, and there being no bidder but the respondent Leclaire, who came out with the bailiff, the sale can be set aside.

The four defendants do not appear before the court in precisely the same position. It is possible that Connolly and Leclaire are in good faith. The conduct of the two Roddens admits of no such favorable explanation. But curiously enough, the parties severed in their defence, and there are three appeals, all setting up the same justification, that the sale was regular and lawful. It is plain that the parties have all been manufacturing costs, and as regards the Roddens, the litigation is without any avowable interest. I should have condemned them all to costs, but some of the judges are of opinion that the appellants were to some extent in fault in not opposing the seizure, and therefore that a distinction as to costs should be made, and to their opinion I defer. The judgment of the court below will therefore be reversed as to all, without costs against Connolly and Leclaire, but with costs against the Roddens.

CROSS, J. :—

The turning point, in my view of this case, is that the

sale took place without an audience, and the consequence is that the proceeding was a constructive fraud. I concur in the order made as to costs. The Roddens had no business to fight the case, but Connolly and Leclaire are in a different position. Connolly was pursuing a right due to to him, and Leclaire seems to have been in perfect good faith.

The judgment of the Court is as follows :—

" The Court, etc...

" Considering that the piano attached in this case, was the property of the appellants, that it was sold without the presence of any sufficient audience, there being only one bidder ; that it was sold *à vil prix*, and without the knowledge of the appellants ;

" And considering that there is error in the judgment appealed from, rejecting the action *en saisie-revendication ;*

" Doth reverse the said judgment, and proceeding to render the judgment the Court below ought to have rendered, doth maintain the said action, and doth declare the appellants to be owners of the said piano, and doth order the guardian in whose charge the said piano was placed under the seizure in this cause, to deliver over to the said appellants the said piano within eight days after service upon him of the present judgment, *sous toutes peines que de droit*, and in default of said piano being delivered to plaintiffs within said delay, doth condemn the respondents jointly and severally to pay and satisfy to the said appellants the sum of $300, without costs against the respondents Connolly and Leclaire, and with costs against the respondents Richard Rodden and William T. Rodden, as well in this Court as in the Court below.

(The Hon. Mr. Justice Tessier dissenting)."

Butler & Lighthall, attorneys for appellants.

David & Laurendeau, attorneys for Olivier Leclaire.

J. J. Beauchamp, attorney for R and W. Rodden.

C. Lebeuf, attorney for Connolly.

(J. K.)

November 27, 1886.

Coram DORION, J. C., MONK, RAMSAY, CROSS, BABY, JJ.

JOSEPH BOUCHARD,

(*Opposant en cour inférieure*),

APPELANT;

ET

L. J. LAJOIE,

(*Demandeur contestant en cour inférieure*),

INTIMÉ.

Procédure—Faits nouveaux par réplique—Réméré par créancier du vendeur.

JUGÉ:—1. Qu'un demandeur, qui a produit une contestation à une opposition, peut alléguer par une réplique spéciale à la réponse de l'opposant, un jugement intervenu dans une autre cause entre l'opposant et le débiteur du demandeur contestant, qui règle le litige entre l'opposant et le contestant, lorsque ce jugement a été rendu depuis la production de la contestation; surtout si dans la contestation et la réponse il a été fait allusion à cette autre cause et que l'opposant ne se soit pas plaint en cour inférieure de l'irrégularité de la réplique en en demandant le rejet ou autrement par la procédure écrite;

2. Que le créancier peut exercer la faculté de réméré au lieu et place de son débiteur et que s'il intervient un jugement entre ce dernier et l'acquéreur d'un immeuble accordant le réméré et fixant le montant payable à l'acquéreur pour obtenir la rétrocession, le créancier bénéficie de tel jugement et peut exercer les droits et se prévaloir des avantages qu'il assure à son débiteur et les opposer à l'acquéreur;

3. Que sous ces circonstances, si l'immeuble a été délaissé par l'acquéreur et vendu en justice et qu'il soit colloqué pour les sommes qu'il a payées, le créancier du vendeur peut faire réduire telle collocation au montant fixé par le jugement accordant le réméré et déterminant la somme que l'acquéreur pouvait exiger avant de parfaire la rétrocession;

4. Qu'en pareil cas, si les deniers devant la cour sont suffisants pour acquitter les réclamations de l'acquéreur, le créancier n'est pas tenu de lui faire des offres de la somme que le vendeur était tenu de lui payer pour obtenir la rétrocession de l'immeuble.

Le 26 avril 1878, A. Trudel, le défendeur en cette cause, consentit une obligation, à l'opposant, Joseph Bouchard, pour $500. Le 27 janvier 1880, le défendeur

Trudel par acte de dation en paiement céda à l'opposant ses propriétés, dont les immeubles vendus en cette cause faisaient partie, en paiement de l'obligation de $500 plus haut mentionnée, et de plus à la charge de payer des dettes hypothécaires grevant les dits immeubles, savoir $5,500 dues à la Société de Construction Jacques-Cartier et $1125 et intérêts dues au Crédit Foncier. L'opposant prit possession des propriétés en question et un an après, sur une poursuite hypothécaire, il délaissa. Dans l'intervalle le demandeur institua la présente action pour faire annuler le dit acte de dation en paiement comme nul quant à lui et fait en fraude des droits des créanciers du défendeur. Jugement fut rendu en faveur du demandeur et en exécution de ce jugement les immeubles en question furent vendus. Le produit de cette vente est l'objet des présentes contestations. En même temps que le défendeur consentait l'acte de dation en paiement à l'opposant, ce dernier lui donnait une contre-lettre stipulant droit de réméré en faveur du défendeur.

Le défendeur institua une action, sous No. 676 de la Cour Supérieure, contre l'opposant pour recouvrer les propriétés en vertu de telle contre-lettre. Nous verrons dans un instant la connexité de ces faits avec les contestations dont il s'agit.

Les propriétés ayant été vendues à la poursuite du demandeur comme nous l'avons dit, l'appelant produisit trois oppositions sur le produit de telle vente :

Par la première il réclame $77.01 pour améliorations faites aux propriétés vendues en cette cause.

Par la seconde il réclame $3,006.02 par lui payées à la Société de Construction Jacques-Cartier et au Crédit Foncier pour le défendeur aux termes de la dation en paiement.

Par la troisième il réclame $795, capital et intérêts de l'obligation de $500, que lui avait consentie le défendeur en 1878.

Le demandeur a contesté les trois oppositions, alléguant l'acte de dation en paiement, la jouissance par l'opposant

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des fruits et revenus des dits immeubles, lesquels s'élèvent, allègue le demandeur, à un montant plus élevé que les créances réclamées par ses oppositions, et en outre la mauvaise foi de l'opposant en prenant possession des propriétés. Le demandeur allègue de plus que la validité de la créance du dit Bouchard est le sujet d'une contestation dans une cause No. 676, de *Trudel* v. *Bouchard*, laquelle est en délibéré ; et le demandeur conclut à ce que les prétendues créances de l'opposant soient déclarées compensées et éteintes par les fruits et revenus du dit immeuble.

L'opposant a répondu que dans l'action No. 676 de *Trudel* v. *Bouchard*, Trudel a réclamé de l'opposant les intérêts sur le prix total des dits immeubles ; que les fruits et revenus qui représentent les intérêts du prix des dits immeubles ne peuvent être réclamées de Bouchard en même temps que les dits intérêts réclamés comme susdit en la dite cause No. 676, de *Trudel* v. *Bouchard* ; que Lajoie exerce ici l'action de son débiteur, dejà exercée de bonne foi, sous une autre forme, par ce débiteur lui-même ; que la demande de ces intérêts par Trudel est encore pendante.

Le demandeur a répliqué spécialement que depuis la production de la réponse de l'opposant, la cause No. 676 de *Trudel* v. *Bouchard* avait été jugée et que la réclamation de l'opposant contre le défendeur avait été réduite à $580 comme étant le seul montant que ce dernier lui devait sur les immeubles en question ; et que cette créance étant la même que celle réclamée par ses trois oppositions, il ne pouvait être colloqué que pour cette somme.

Le demandeur a prouvé que les réclamations de l'opposant telles que portées dans ses trois oppositions sont identiquement les mêmes que celles mentionnées, débattues et jugées dans la cause No. 676.

La cour supérieure (JOHNSON, J.) accueillant la prétention de l'opposant, que l'intimé devait prouver la valeur des fruits et revenus, renvoya les contestations.

La cour de révision (31 janvier 1884) composée des honorables juges DOHERTY, JETTÉ et LORANGER, infirma

unanimement ce jugement quant aux deux principales oppositions (la seconde et la troisième), et maintint les contestations.

Voici les termes du jugement:

"La Cour, après avoir entendu les parties sur la demande de révision du jugement rendu en cette cause, le 30 novembre 1883, maintenant les oppositions du dit opposant Bouchard et les collocations à lui accordées par les items 10e, 12e, 15e et 17e du projet d'ordre de distribution des deniers en cette cause et déboutant le demandeur de ses contestations d'icelles; avoir pris connaissance des écritures des dites parties sur ces diverses contestations, examiné leurs pièces et productions respectives, dûment considéré la preuve et délibéré;

"Attendu que par sa première opposition Bouchard réclame une somme de $77 pour réparations nécessaires par lui faites aux immeubles vendus en cette cause, pendant le temps de sa possession d'iceux, en vertu d'une vente à lui consentie par le défendeur, et que cette somme lui est accordée par l'item 10e du projet d'ordre de distribution;

"Attendu que par sa deuxième opposition Bouchard réclame une autre somme de $3006.02, laquelle lui est aussi accordée par les items 12e et 15e du dit projet d'ordre, comme suit, savoir:

"13e Comme subrogé aux droits de Ferdinand David & al., de Joseph Godin et du Crédit Foncier du Bas-Canada en capital et intérêts $657.72.

"15e Comme subrogé au Crédit-Foncier du Bas-Canada, sur délégation de Godin ce que payé par lui Bouchard au Crédit Foncier le 17 février 1880 ..... $1325.02

"Et les intérêts $285.98

"De plus comme subrogé à la Société de Construction Jacques-Cartier ce que payé par Bouchard en 1880 et 1881 ..... $737.30

"Ces quatre dernières sommes formant réunies celle réclamée par la dite dernière opposition, savoir: $3006.02

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"Attendu que par sa troisième opposition en cette cause Bouchard réclame une autre somme de $780.00, capital $500.00 et intérêts accrus sur une obligation du 26 avril 1878, à lui consentie par le défendeur Trudel, pour l'acquit de laquelle ce dernier lui avait donné en paiement les immeubles vendus, mais que Bouchard avait encore droit de réclamer, vu l'annulation de cette dation en paiement: et attendu que par la collocation 17e du projet d'ordre de distribution, le dit opposant est colloqué pour $46.37 à compte de cette réclamation, cette somme étant la balance des deniers prélevés:

"Attendu que le demandeur ès-qualité a contesté ces diverses réclamations et collocations de Bouchard, alléguant que pendant sa possession et détention des dits immeubles il en avait retiré les fruits, après demande d'annulation de son titre; qu'il était par suite comptable de ces fruits et qu'ils étaient plus que suffisants pour éteindre toutes ses dites réclamations; et que d'ailleurs la validité des dites réclamations était le sujet d'une contestation alors pendante et en délibéré dans une cause entre les dits Trudel et Bouchard et portant le No. 676 des dossiers de la Cour Supérieure;

"Attendu que les parties ayant ensuite inscrit leur cause à l'enquête, le demandeur a produit, au soutien de ses contestations, diverses pièces établissant que les réclamations susdites de l'opposant étaient les mêmes que celles par lui faites dans la dite cause No. 676, et que Bouchard examiné comme témoin a admis que ces réclamations étaient les mêmes et fondées sur les mêmes titres;

"Attendu que parmi les pièces produites par le demandeur, se trouve un jugement rendu dans la dite cause No. 676, le 28 juin 1883, réglant définitivement toutes les réclamations du dit Bouchard contre les dits immeubles vendus et celles à lui opposées par le propriétaire Trudel, et fixant, après compensation, la balance finale que Bouchard avait droit de réclamer, en vertu des divers titres par lui invoqués dans ses oppositions, à la somme de $580.08;

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" Considérant que, par suite de ce que dessus établi, Bouchard est sans droit aux diverses collocations à lui octroyées par le rapport de distribution préparé en cette cause, pour tout ce qui excède et dépasse la dite somme de $580.08;

" Considérant en conséquence qu'il y a erreur dans le dit jugement du 30 novembre 1883 dont la révision est demandé;

" L'infirme, et, procédant à rendra le jugement que la Cour de première instance aurait dû rendre:

" Maintient les contestations des oppositions et collocations de l'opposant par le demandeur pour tout ce qui excède la somme de $580.08, susdite, et ordonne que le projet d'ordre de distribution préparé en cette cause soit, en conséquence réformé, de manière à n'accorder à l'opposant sur ses dites réclamations réunies qu'une balance finale de $580.08, et renvoie, en conséquence, les dites réclamations et collocations de Bouchard pour le surplus."

Bouchard interjette appel de ce jugement devant la Cour du Banc de la Reine.

21, 22 sept. 1886.] *Robidoux*, pour l'appelant, en demandant l'infirmation du jugement de la Cour de Révision, prétendait que les allégués de la réplique contenaient des faits nouveaux qui ne pouvaient être plaidés que par une demande supplémentaire ou plaidoyer *puis darein continuance*; et sur le mérite de la contestation: que pour que le jugement de la Cour de Révision fût maintenu il fallait que l'intimé pût démontrer que les principes qui régissent les droits et les obligations du créancier demandant la révocation d'un acte comme fait en fraude de ses droits par son débiteur, sont les mêmes que ceux qui régissent les droits et les obligations du vendeur avec faculté de réméré, contre son acheteur, tandis qu'il y avait une grande différence entre les deux.

Le vendeur avec faculté de réméré réclame à son acheteur l'exécution de toutes les obligations auxquelles celui-ci s'est obligé par l'acte de vente. Entre l'appelant et l'intimé telle que la contestation est liée, la somme dont l'appelant peut être débiteur n'est que le montant des

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fruits et revenus que l'intimé aura prouvé avoir été perçus par l'appelant. Aucune preuve n'a été faite par l'intimé du montant de ces fruits et revenus. Maintenant, le jugement rendu dans la cause No. 676 où le défendeur a exercé son action en réméré contre l'appelant peut-il être invoqué par l'intimé ? Non, parce que le défendeur avant de prendre possession des immeubles en vertu de son droit de réméré devait lui payer la somme de $880, et se faire accepter par les créanciers hypothécaires au lieu et place de l'appelant ; et cette condition n'a jamais été accomplie.

L. Laflamme, pour l'intimé, répondit d'abord sur la question de procédure : L'intérêt sur le prix d'achat représentant les fruits et revenus, la réplique n'allègue pas de faits nouveaux. Elle doit valoir en tout cas comme demande supplémentaire. Il n'était pas nécessaire d'obtenir la permission de la Cour pour la produire. Si elle était irrégulière l'appelant devait s'en plaindre. Il y a acquiescé en répondant aux articulations sur les faits mentionnés dans la réplique et en laissant faire sans objection une preuve sur ces mêmes faits. L'intimé peut se passer de la réplique, il a allégué que l'appelant avait perçu les revenus et il le prouve par un jugement de la Cour.

Au mérite, l'avocat de l'intimé répond : Bouchard acquiert de Trudel les propriétés en question en cette cause à la charge de payer les hypothèques, Trudel se réservant le droit de réméré ; il poursuit ensuite Trudel pour exercer le rachat et obtient gain de cause. Bouchard et Trudel présentent leurs réclamations et la Cour fixe le montant dû à Bouchard à $580. Les réclamations en question dans la présente cause sont les mêmes que celles réglées par ce jugement, la collocation de Bouchard doit donc être réduite au montant qui y est établi. Quant à l'objection que l'appelant est responsable du paiement des créanciers hypothécaires, l'intimé répond que ces créances étant colloquées au jugement de distribution, elles sont éteintes et l'appelant est déchargé de toute responsabilité. La somme que l'intimé serait tenu d'offrir pour obtenir la rétrocession est déposée devant la Cour.

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DORION, J. C., pour la Cour :—

Nous sommes d'avis de confirmer le jugement. La procédure de l'intimé n'est peut-être pas parfaitement régulière, mais il n'y a rien qui établisse que l'appelant en ait souffert. Nous ne voyons pas qu'il fût nécessaire pour l'intimé d'obtenir la permission de la Cour pour produire une demande supplémentaire. De plus la cause No. 676 de *Trudel* v. *Bouchard* était alléguée dans la contestation. Dans tous les cas, si la réplique était irrégulière, l'appelant devait s'en plaindre en temps utile et la faire déclarer telle.

Quant à la question au mérite il est évident que Lajoie peut exercer l'action de son débiteur et, par conséquent, le droit de réméré. Le montant que Bouchard a droit de réclamer pour impenses et améliorations a été fixé par un jugement dans la cause No. 676 entre Trudel et lui à la somme de $580; Lajoie a donc le droit de se prévaloir de ce jugement et de faire réduire la collocation de Bouchard en conséquence.

Jugement confirmé.

Robidoux & Fortin pour l'appelant.

Laflamme, Huntington, Laflamme & Richard pour l'intimé.

(J. J. B.)

May 26, 1886.

Coram DORION, C. J., MONK, CROSS, BABY, JJ.

WILLIAM DUDLEY ET AL.,
(*Plaintiffs in Court below*),
APPELLANTS;

AND

WILLIAM DARLING,
(*Defendant in Court below*),
RESPONDENT.

Imputation of payments—C. C. 1159—*Account rendered yearly during series of years—Acquiescence.*

HELD:—1. Where the credits for each year, in an account current, are in excess of the amount of interest charged for the year, it cannot be pretended that compound interest has been charged, inasmuch as (under C. C. 1159) payments made by a debtor on account are imputed first on the interest.

2. (CROSS, J., *diss.*) Where an account current was rendered each year during a long series of years, charging commissions as well as interest, and the debtor, being pressed to close the account, without formally admitting or denying the right to charge such commissions, continued to remit sums on account, which remittances (if commissions should not have been charged) were more than sufficient to pay the claim, it is a fair inference that the debtor acquiesced in the rate of commissions as charged, and he is obliged to settle the balance of the account on that basis.

The appeal was from a judgment of the Superior Court, Montreal (MATHIEU, J.), July 8, 1884, dismissing an action brought by the trustees and executors of the late William Dudley, for a balance of account.

The judgment appealed from was in the following terms:—

"La Cour, etc.....

"Considérant que les demandeurs allèguent dans leur déclaration que le défendeur s'était obligé au payement de l'intérêt sur toute avance faite au taux de 7½ p. c., et que cet intérêt devait comprendre tous frais de commission;

" Considérant que le défendeur admet cette convention ;

" Considérant que malgré cette convention formelle, les demandeurs chargent une commission et l'intérêt sur la commission, et chargent aussi l'intérêt composé sur les balances dues quoiqu'il n'y ait pas de convention formelle à cet égard ;

" Considérant que le fait que des comptes auraient été rendus périodiquement au défendeur chargeant le montant de ces commissions, n'est pas suffisant sans une acceptation formelle de la part du défendeur pour obliger ce dernier à payer le montant de ces commissions qui, suivant une convention formelle alléguée par les demandeurs eux-mêmes, devait être comprise dans les intérêts qui sont chargés ;

" Considérant que le montant des commissions ainsi chargé par les demandeurs au défendeur et l'intérêt sur icelui, tel que chargé dans le compte, est plus que suffisant pour couvrir la balance réclamée du défendeur par les dits demandeurs ;

" Considérant que pour ces raisons les défenses du dit défendeur sont bien fondées ;

" A maintenu et maintient les dites défenses et a renvoyé et renvoie l'action des dits demandeurs."

May 15, 1886.]

W. W. Robertson, Q. C., for the appellants.

J. L. Morris for the respondents.

CROSS, J. (*diss.*) :—

The appellants, trustees under a deed poll and executors under the last will of the late William Dudley, of Birmingham, in England, brought the present action against William Darling, hardware merchant of Montreal, claiming £744 9s. 11d. stg. as balance of an account current for some years carried on between the respondent and the deceased, William Dudley, who died 27th February, 1876, at which time the balance amounted to £7,496 12s. 4d. stg. when the account was virtually closed, a very small quantity of goods being afterwards furnished by the executors, but from which time, annual accounts had been

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regularly furnished to the respondent, charging the interest at 7½ per cent. per annum and crediting payments, thus reducing the balance on the 31st December, 1881, to the amount sued for, the appellants alleging that the yearly accounts had been accepted by respondent without objection and acknowledged by him as due. The declaration also contained an averment as follows:—"And the "said plaintiffs specially allege that the transactions be- "tween the said late William Dudley and defendant, or the "firms which he now represents, originated so far back "as the year 1870, when arrangements were made that "the said William Dudley should sell and deliver to the "said firm such goods, wares and merchandises as they "should require and should order, at the prices then cur- "rent, and that interest on all overdue accounts should "be charged and paid at the rate of 7½ per cent. per an- "num, *the same to include all fees and commissions* to "which the said William Dudley or his representatives "might be entitled for services rendered to the defendant "as his agents, and which rate was the then current rate. "and which said defendant recognized and followed as "the business arrangement agreed upon and always re- "cognized and acted upon from the year 1870 down to "the 31st December, 1881."

The respondent pleaded first by demurrer, alleging as grounds that the late Wm. Dudley, having divested himself by deed poll of all interest in the present demand, appellants could not claim the same in their quality of executors.

To the merits, he denied having accepted or acknowledged the account, and objected to being charged commissions over and beyond the 7½ per cent., according to the agreement; further, that the appellants had charged him compound interest, contrary to law, and that the deductions to be made on these grounds showed that nothing was due to appellants.

The appellants proved by the answers of William Darling that the annual accounts had been regularly rendered since the decease of William Dudley, including

interest, charged at 7½ per cent. per annum, corresponding with the account current produced, including the balance stated to be due at the death of William Dudley, and brought down to December 31, 1881. This account, however, did not show any commissions charged, although they were included in the entries of goods, as was shown by the evidence afterwards adduced by the respondent.

They also produced the correspondence between the parties, one leading feature of which was a pressing solicitation on the part of the appellants to have the account acknowledged and closed, and an evasion on the part of Darling to admit the account, although he kept remitting sums on account of the balance, for which he asked and was given credit.

The respondent, Darling, produced the detailed accounts furnished him from the commencement of the account, showing that in each of them there were commissions charged sometimes at 3 per cent. and sometimes at 5 per cent, and that the gross amount, including the commission, was carried into the account current as goods, thus making with the 7½ per cent. interest thereon charged, a charge of from 10½ to 12½ for commission and interest, whereas, if the 7½ per cent. included both commission and interest. according to the alleged agreement, the account would be surcharged to the extent of the commissions and the interest thereafter charged as accumulating thereon.

The respondent produced witnesses to show that the amount of these extra commissions was £654. 14s. 7d. sterling, an easy operation, as they were extracted from the appellant's own accounts, and that the compound interest calculated thereon would amount to £553. 18s. 7d. sterling, making the sum claimed to be chargeable back to the appellants amount to £1,208. 13s. 2d. sterling, while their claim was only for £744. 9s. 11d. sterling.

The appellants have relied upon a series of authorities to prove that the respondent had acquiesced in the account by failing to make objections thereto, notwithstanding the yearly rendering of it to him with the objectionable items

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included, and also that when he made objections to it as late as on the 24th day December, 1880, he had objected, not to the commissions but to the interest, offering to settle the claim if interest was charged at 5 per cent.

The judge of the Superior Court, although in his judgment he states that compound interest has been charged, bases his judgment upon the fact of commissions being charged over and beyond the 7½ per cent. agreed upon which, together with the interest thereon, would amount to more than the balance claimed.

It is unnecessary to consider whether compound interest has been charged, because simple interest on the commissions would swell their amount to a sum considerably in excess of the balance claimed, but in view of the rule contained in 1159 C.C. it would probably be considered, on the facts of this case, that no compound interest was charged, inasmuch as the credits in each year were in excess of the interest charged for the year. By art. 1078 C. C. a special agreement is necessary to warrant a charge of compound interest. I do not think an implied agreement would suffice, but the case does not admit of this question being raised.

As regards the double charge of commissions, viz., that included in the 7½ per cent. according to the agreement alleged and the additional charges of commissions on the specific sales of goods, I consider that the respondent made out his case. I find no acquiescence in the account current by the correspondence, but rather a studied purpose to avoid doing so, perhaps not very frank, and it may be, proceeding from the fact that it might not have been very convenient to pay up the whole balance at once, but not sufficient to oblige the respondent to pay what he manifestly did not owe; nor do I think that the objection to the 7½ per cent. as interest, desiring it to be reduced to 5 per cent., was an absolute limitation of respondent's objection to a surcharge of interest and a waiver by him of objections to commissions, the fact being that the commissions were understood to be included in the 7½ per cent., and in objecting to this, he objected to commissions; and notwith-

standing the apparently formidable list of authorities cited by the appellant as regards acquiescence or estoppel, I consider that they do not apply. These authorities would control cases where the charges were of such a nature as rendered it doubtful whether they could be made or were legitimate charges if agreed to, but if manifestly erroneous charges, as being made contrary to agreement or otherwise without foundation, would not to my mind be warranted by mere silence in the absence of express consent.

The appellants have themselves alleged the agreement, and the respondent having, probably, no other proof of it readily at hand, has put on record an admission of the agreement as if it had been requested by the appellants. This was unnecessary, as the appellants were bound by their allegation: they however now contend that this allegation was a mere mistake, that they ought to have and could have amended their declaration, which would have entitled them to judgment in the absence of such an allegation. It seems to me there is no probability of the allegation being a mistake. A charge of 7½ per cent. interest in an English commercial account would be quite unusual. It is comprehensible when understood to comprise commission. If appellants had amended their declaration, respondent could have alleged the agreement in his plea and presumably could have proved it. He was dispensed from doing so by accepting appellants' own statement of the fact The plaintiffs (appellants) first set up this alleged agreement for 7½ per cent. interest in 1880, whereupon Darling wrote to them for a copy of it, to which the reply was that the agreement was verbal. They neither proved a written nor a verbal agreement, and the respondent was fairly entitled to concur in their own averment of it. I therefore conclude that the judgment of the Superior Court should be confirmed.

DORION, CH. J.:—

It is proved that yearly accounts were sent to the respondent by William Dudley while he lived, and in these accounts, interest was charged at the rate of 7½ per

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cent. After the death of William Dudley his executors repeatedly applied to Darling for a settlement of the balance. This is proved by a number of letters which are produced. Darling did not dispute the account, but continued to remit sums on account, and these sums were placed to his credit, that is, they were credited to him on the account which had been sent to him. The Court below clearly erred in saying that compound interest had been charged. There was no compound interest, as the interest was extinguished by the payments made on account from year to year. The majority of the Court are of opinion that Darling, never having repudiated any of the charges, and having continued to make payments on account, must be held to have acquiesced. We therefore reverse the judgment of the Court below, and give the appellants judgment for the full amount claimed by them.

The judgment is as follows :—

"The Court, etc.....

"Considering that it is proved that according to the course of business carried on during a period extending from the year 1870 to the year 1876, between the late William Dudley and the late William Darling, and the correspondence carried on between the appellants, representing the said late William Dudley, and the said William Darling, from 1876 to May 1880, that the said late William Dudley was in the habit of charging the said William Darling with interest at the rate of 7½ per cent. on all balances of advances made by the said late William Dudley to the said William Darling, including in said balances all charges for commission, which charges were made in the accounts periodically transmitted to the said William Darling, and at least once every year ;

"And considering that the said William Darling never complained of the rate or amount of interest so charged, but did every year, from 1870 to 1880, transmit to the said late William Dudley, and to his representatives, the present appellants, large sums of money on account of his indebtedness to them, until the 20th of May, 1881, when

he refused to pay the balance claimed by the appellants, on the ground that the interest should be charged at the rate of five per cent.;

"And considering that the respondents are not entitled to the reduction of interest which they demand, the said late William Darling having for a period of ten years acquiesced in the charges and finally promised to pay the amount claimed;

"And considering that there is no compound interest charged in the accounts furnished by the said late William Dudley and the present appellants, who have credited the said William Darling with the sums he has transmitted to them, on the balances in principal and interest due at the time of such remittances as they were entitled to by law (Art. 1159, C. C.);

"And considering that at the time of the institution of this action the said William Darling was indebted to the appellants in the sum of £744 11s. 9d. stg., equal to $3,623.16, cy., and that there is error in the judgment rendered by the Court of original jurisdiction, to wit, the Superior Court, sitting at Montreal, on the 8th of July, 1884;

"This Court doth quash and annul the said judgment of the 8th July, 1884, and proceeding to render the judgment which the said Court of original jurisdiction ought to have rendered, doth condemn the respondents *ès qualité* to pay to the said appellants *ès qualité* the sum of $3,623.16, cy., with interest thereon from the 31st of December, 1881, and costs as well in the Court below as on the present appeal (the Hon. Mr. Justice Cross dissenting)."

Judgment reversed.

Robertson, Ritchie & Fleet, attorneys for appellants.

John L. Morris, attorney for respondent.

(J

June 30, 1886.

Coram DORION, Ch. J., RAMSAY, TESSIER, CROSS, BABY, JJ.

ROBERT HEYNEMAN,

(*Defendant in Court below*)

APPELLANT;

AND

ABRAHAM HARRIS,

(*Plaintiff in Court below*),

RESPONDENT.

Insolvent Trader—Departure after making assignment—Saisie-arrêt—Privilege of commercial traveller.

HELD:—The fact that an insolvent trader has made a voluntary assignment of his estate, does not justify his departure from the country without the consent of his creditors. It is his duty to be present, in order to give such information as may be required for the realization of his assets, and his departure without explanation is ground for the issue of a *saisie-arrêt* before judgment.

The privilege of a commercial traveller for wages, under C. C. 2006, which was maintained by the court below (M. L. R., 1 S. C. 191) not determined by the Court of Appeal, but doubted.

The appeal was from an interlocutory judgment of the Superior Court (LORANGER, J.), Dec. 6, 1884, rejecting a petition to quash a *saisie-arrêt* before judgment, and from the final judgment in the same suit (TORRANCE, J.), March 2, 1885, maintaining the *saisie-arrêt*.

The interlocutory judgment was as follows:—

"La Cour, etc.

"Considérant qu'il est en preuve que le défendeur a, dans une première assemblée de ses créanciers convoquée dans le but de considérer l'état de ses affaires, fait de fausses représentations, en exagérant l'état de son actif; que cette assemblée fut ajournée ultérieurement pour plus amples renseignements sur l'état de la faillite et aviser aux moyens les plus convenables pour en opérer le réglement;

"Considérant que dans l'intervalle de ces deux assem-

blées, le défendeur a quitté secrètement la Puissance du Canada avec l'intention de se fixer en pays étranger, qu'il fut constaté, lors de la seconde assemblée ainsi ajournée, que l'actif du défendeur était beaucoup moindre que le chiffre ainsi faussement représenté par lui : que le dit actif, suivant l'état fourni par le nommé Evans n'a pu réaliser qu'une somme de $3,907.29 pour payer un passif de plus de $128,779.57 ;

" Considérant que l'intention frauduleuse du défendeur, en quittant le pays, ressort suffisamment des aveux qu'il a fait au nommé Smith, auquel il a déclaré à New York, qu'il ne voulait point retourner au pays attendu qu'il craignait d'être mis en prison, vu son départ de la ville de Montréal ;

" Considérant que la ratification de la cession de biens du défendeur faite par le demandeur n'est pas une présomption que le dit demandeur a entendu renoncer aux autres recours de droit qu'il possède contre le défendeur ; que la fraude commise par le défendeur en quittant le pays n'a pas été couverte par les actes de diligence que le demandeur a pu faire pour se faire colloquer au marc la livre ou même par préférence sur le produit de la vente des biens du défendeur ;

" Considérant que les fausses représentations du défendeur, tel que ci-dessus mentionné, et le départ frauduleux, ont vicié la cession qu'il a faite de ses biens au tiers saisi Walters, et ont rendu la dite cession nulle et sans effet : que la ratification ou l'acceptation faite par le demandeur de la dite cession doit être pour la même raison, considérée comme non avenue ;

" Considérant que le défendeur n'a point prouvé les allégués de sa requête ;

" Renvoie la dite requête demandant le rejet de la *saisie-arrêt* émanée en cette cause."

The final judgment was as follows :—

" The Court, etc.

" Considering that the plaintiff hath established his right to be collocated by preference on the goods in the store where he served the defendant, for three months' wages, amounting to $700, from the 1st of January to 31st of March, 1883, inclusive ;

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"Doth adjudge and condemn the defendant to pay and satisfy to the plaintiff the said sum of $700, with interest thereon from the 3rd of September, 1883, and costs of suit *distraits* etc., and doth declare the attachment (*saisie-arrêt*) made in this cause in the hands of the *Tiers-Saisis* to be good and valid, and considering that the *Tiers- Saisi* Edward Evans has declared that on the 6th of March, 1883, the said defendant, by deed before notary, assigned and transferred to Charles H. Walters, the other *Tiers-Saisi*, his estate and effects in trust; that subsequently on the 30th of March, 1883, the said Walters appointed the said Evans his irrevocable attorney for the purposes of the said deed of assignment; that as such attorney the said *Tiers-Saisi*, Evans, has realized the assets of defendant, and had in his hands at the date of the service of this writ of *Saisie-arrêt*, a sum exceeding $2,000, as the proceeds of the sale of the goods so transferred by defendant to said Walters; and that the liabilities of the estate exceed $60,000; it is ordered that the said *Tiers Saisi*, Evans, do, within fifteen days after service upon him of this judgment, deposit in the hands of the Prothonotary of this Court, the said sum of $2,000, in order that the same be distributed among the creditors of the said defendant according to their respective rights, and that a report of distribution be prepared for that purpose in this cause, unless the *Tiers Saisis* do, within the said delay, pay to plaintiff the said sum of $700, interest and costs, and to the payment and deposit of the said sum of $2,000, the said *Tiers Saisis* shall be held and constrained by all legal ways and means, and in so doing duly discharged."

See M. L. R., 1 S. C. 191, for observations of Torrance, J., in rendering the above judgment.

May 27, 1886.] *A. W. Atwater*, for the appellant.

L. N. Benjamin, for the respondent.

CROSS, J.:—

Action for wages of a commercial traveller, which he claims by privilege, and accompanies it by an attachment,

saisie-arrêt before judgment, in the hands of Walters, assignee, and Evans, his agent, to whom Heyneman had assigned his estate. There was a petition to set aside the attachment, and the defendant besides contested any claim for privilege. It appeared by the evidence that the defendant, Heyneman, some four months before the attachment was taken, assigned his estate to Chas. H. Walters, who employed Evans to wind it up. Harris had filed his claim with the assignee, without alleging any privilege, but afterwards took the attachment on the ground that Heyneman had absconded to defraud. It appears that he went to New York, and refused to return, for fear of being capiased. His estate, in Evans' management, realized $2,000.

The petition to quash the *saisie-arrêt* was dismissed on 6th December, 1884, and on the 9th March, 1885, Judge Torrance ordered the payment into Court of the $2,000, to be distributed among Heyneman's creditors, according to law, or in default that the *Tiers Saisis* should pay Harris his debt of $700, with interest and costs.

Heyneman, the defendant debtor, appeals from this judgment, contending that he did not leave with fraudulent intent, and that the plaintiff, Harris, had no privilege.

As to the first question, Heyneman left without the permission of his creditors. It was not enough for his protection that he should have assigned what he gave up as his estate; this did not of itself prove that it was all his estate; the duty of an insolvent is not only to give up his property, but to be ready to give all necessary explanations for its realization, he should be present to do so; his leaving without explanations should be presumed a fraud until fully explained in a sense to justify it. This Heyneman has not done.

As to the debt being privileged, it is probably not so. The Court does not decide this question; it is unnecessary to do so, and the declaration of the Judge, as one of the motives of the judgment, would not bind the other creditors. The defendant has really no interest as to who

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are privileged on his estate; he should pay all his creditors. He is equally liable to the unprivileged as to the privileged.

The judgment is as follows:—

"The Court, etc.....

"Considering, that the respondent (plaintiff below) hath established his right to be collocated for three months' wages, amounting to $700, from the 1st of January to the 31st of March, 1883, inclusive;

"Doth adjudge and condemn the defendant, now appellant, to pay and satisfy to the plaintiff, now respondent, the said sum of $700, with interest thereon, from the 3rd September, 1883, and costs of suit *distraits* to L. N. Benjamin, Esq., attorney for plaintiff, and doth declare the attachment (*arrêt*) made in this cause in the hands of the *tiers saisis* to be good and valid, and considering that the *tiers-saisi*, Edward Evans, has declared that on the 6th of March, 1883, the said defendant, by deed passed before Cleveland, notary, assigned and transferred to Charles H. Walters, the other *tiers-saisi*, his estate and effects in trust, that subsequently, on the 30th of March, 1883, the said Walters appointed the said Evans his irrevocable attorney for the purposes of the said deed of assignment; that as such attorney, the said *tiers saisi*, Evans, has realized the assets of defendant, and had in his hands, at the date of the service of this writ of *saisie-arrêt*, a sum exceeding $2,000, as the proceeds of the sale of goods so transferred by defendant to said Walters; and that the liabilities of the estate exceed $60,000; it is ordered that the said *tiers-saisi*, Evans, do, within 15 days after service upon him of this judgment, deposit in the hands of the prothonotary of this Court, the said sum of $2,000, in order that the same be distributed among the creditors of the said defendant, according to their respective rights; the Court reserving to adjudicate on the privilege and preference claimed by the said respondent on the distribution to be made of the moneys in the hands of the said *tiers-saisi*;

"And it is hereby ordered that a report of distribution be prepared for that purpose in this cause, unless the *tiers*

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saisi do, within the said delay, pay to the plaintiff the said sum of $700, with interest and costs, and to the payment and deposit of the said sum of $2,000, the said *tiers-saisis* shall be held and constrained by all legal ways and means, and in so doing, duly discharged."

Judgment modified.

Atwater & Cross, attorneys for appellant.

L. N. Benjamin, attorney for respondent.

(J. K.)

June 30, 1886.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

THOMAS McGREEVY,

(*Defendant in Court below*),

APPELLANT;

AND

LOUIS A. SENÉCAL,

(*Plaintiff in Court below*),

RESPONDENT.

Promissory note—Evidence—Refusal to send the case back to enquête.

In an action on a promissory note for value received, the Court of appeal will not be disposed, unless for some substantial reason, to send the case back to *enquête*. And so where the defendant was in default to proceed, and finally, after the case had been taken *en délibéré*, wished to examine some witnesses, and the Court below rejected the application, the Court of appeal refused to send the case back, on the ground that the defendant had not shown any substantial grievance.

The appeal was from a judgment of the Superior Court, Montreal (LORANGER, J.), March 14, 1885, maintaining the respondent's action.

The judgment was in the following terms:—

"La Cour, etc.....

"Considérant que le demandeur réclame par son action

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la somme de $5,000, montant d'un billet promissoire daté Québec, 23 janvier 1883, fait et signé par le défendeur, payable à trois mois de date à l'ordre du dit demandeur, au comptoir de la banque du Peuple à Montréal, pour valeur reçue, avec intérêt de la date de l'échéance du dit billet;

"Considérant que le défendeur a plaidé à l'action que le dit billet n'était qu'un renouvellement de billets antérieurs qu'il a consentis pour accommoder le demandeur, et qu'il n'a jamais reçu considération pour le dit billet;

"Considérant que le billet sur lequel repose la présente action, comporte à sa face qu'il a été signé et consenti par le défendeur pour valeur reçue; que, aux termes de l'article 2285 du Code Civil, la preuve du contraire incombait au défendeur;

"Considérant que le défendeur n'a fait aucune preuve des allégués de sa défense; la Cour condamne le défendeur à payer au demandeur la dite somme de cinq mille piastres, montant du billet susdit, avec intérêt, etc."

May 20, 1886.] *D. Girouard, Q. C.*, for the appellant.
J. Duhamel, Q. C., for the respondent.

CROSS, J., (*diss.*):—

In February, 1884, Gustave Drolet sued the appellant McGreevy on a promissory note for $5,000, drawn by McGreevy, payable to the order of Senécal and by him endorsed to Drolet.

McGreevy pleaded that Drolet was but the *prête-nom* of Senécal; that the promissory note in question was but the renewal of former promissory notes made by McGreevy for the accommodation of Senécal, which was well known to Drolet, who received it long after it matured.

This suit, after being about nine months before the Court, with various proceedings taken therein, was suddenly on the 4th of November, 1884, discontinued, and on the same day, another action was taken by the respondent Senécal against the appellant McGreevy on the same note, acting by the same attorney. McGreevy at once petitioned the Court for the immediate return of

the action, and it was returned the next day. On the 7th of the same month of November, McGreevy pleaded thereto, alleging the same facts as in the former plea, and particularly, in addition, that he had received no value for the note. The pleas were in such case accompanied by the necessary affidavit in support thereof.

The appellant, who seemed at first to wish to press on the case, afterwards, on the excuse of having to attend parliament, and again from illness, was found to be in default to answer interrogatories *sur faits et articles*, for which and to make his *enquête*, he was asking time, while the respondent was pressing on the case.

The appellant was called to answer *faits et articles* on the 3rd of February, 1885. Excuses were presented to the Court on his behalf, representing him to be unable to attend from indisposition.

On the 5th, the case was called, although not specially fixed for that day, and appellant's indisposition was again urged to claim a delay, he having no witnesses present and being unable from indisposition to attend personally. Thereupon the respondent desisted from his rule for *faits et articles* and demanded judgment, and the case was taken *en délibéré*.

On the 12th, the appellant made two motions, one to discharge the *délibéré*, and the other for permission to examine the respondent. The Court rejected the motion to discharge the *délibéré*, but permitted the examination of the respondent. The respondent was examined on the 17th, and admitted that the note in question was a renewal of one given at his request for election expenses, and that he had previously received other $5,000 from the appellant for the same purpose, which he states he had paid.

I see no good reason why the appellant should not have been allowed to examine his witnesses.

When on the 12th of February, the presiding judge permitted the examination of the respondent, he might, without causing any unreasonable delay, have allowed the appellant to examine his witnesses, and the appellant's

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motion for such permission, made on the 12th, I think, should have been granted.

The evidence of the respondent (see appellant's appendix, p. 10, l. 22), seems to me almost enough to make out a case for appellant to claim the dismissal of respondent's action. It shews the expenditure of $5,000 of appellant's money through respondent, for election purposes, with the contemplated expenditure of $5,000 more, if this action is to be maintained. Can these expenditures be considered legitimate without proof? I should have grave doubts.

I would set the judgment aside and send the case back for proof by both parties.

RAMSAY, J.:—

This appeal involves a very simple question. The action is on a promissory note for value received. The appellant, drawer of the note, was first sued by one Drolet. To this suit, the appellant pleaded that he had signed the note for the accommodation of Senécal, and that it was only a renewal of five other notes the appellant had signed for Senécal, likewise for his accommodation. He also said Drolet was a *prête-nom*. Upon this Drolet's action was withdrawn, and a new action instituted in Senécal's name.

It is not easy to find out how the withdrawal of the first action, and putting the original parties face to face, could render the appellant's condition worse. Nevertheless, it is complained of. Had there been anything unusual about the note, it gave the appellant one fact less to prove, namely, that Drolet was Senécal.

To the second action, the appellant pleaded, as before, want of consideration. It is not contended that the appellant has proved his plea. There was an inscription and delays till the 3rd of February. Then appellant was ill and could not answer interrogatories returnable that day. The case went over to the 5th; appellant was still absent and had no witnesses. The respondent then abandoned the rule and asked for judgment, and the case was taken *en délibéré*. On the 12th, a special application was

made to discharge the *délibéré* in order to allow defendant to prove his defence. This was refused, but the Court allowed the appellant's counsel to examine respondent as a witness. This the appellant did, and proved nothing about his defence. As the record stands, no other judgment was possible but the one rendered. One of the learned judges, who dissents, thinks that the answers of the respondent give rise to a presumption of electoral fraud. It is sufficient to say that nothing of the kind is pleaded. I may add, however, that respondent's answers admit or suggest nothing of the kind.

The majority of the Court has not been able to come to the conclusion that all the ordinary presumptions of law and all the ordinary rules of procedure are to be subordinated to the terror of electoral fraud, except in so far as is specially provided by statute. We cannot, therefore, presume that Mr. McGreevy gave Mr. Senécal his note to facilitate the latter in perpetrating an electoral fraud. What remains, then, is a simple question of judicial discretion, and of procedure. We see no reason given to make it necessary or desirable for the judge to discharge the *délibéré*. The action was on a promissory note for value, and it is not expedient that the execution of obligations of that kind should be exposed to fanciful and dilatory proceedings.

The difficulty of procedure has not been explained. We are told that somehow the case got on the roll for the 5th of February. That is undeniable, for it was there, and both parties were represented. Any objection to the inscription should have been shown then. After the case had been seven days *en délibéré*, the appellant acquiesced in all the proceedings by examining respondent. Even now, the appellant does not tell us what the *consideration* for the note was, if not *value*.

The judgment will, therefore, be confirmed with costs.

Judgment confirmed.

D. Girouard, Q. C., attorney for appellant.

Duhamel, Rainville & Marceau, attorneys for respondent.

(J. K.)

May 27, 1886.

Coram DORION, CH. J., MONK, RAMSAY, CROSS, BABY, JJ.

EXCHANGE BANK OF CANADA,
(*Plaintiffs in Court below*),
APPELLANTS;

AND

CANADIAN BANK OF COMMERCE,
(*Defendants in Court below*),
RESPONDENTS.

Compensation—Notes received by Bank for Collection—Insolvency.

HELD (Reversing the decision of TORRANCE, J., M. L. R., 1 S. C. 225):—Where drafts and notes are placed with a bank by a debtor of the bank, not as collateral security, but for collection; that compensation does not take place until the bank has received the amounts collected by them on such notes; and in the present case, the debtor having become insolvent before any amounts were received on such notes, compensation did not take place between the amount collected by the bank and the debt due to it.

The appeal was from a judgment of the Superior Court, Montreal (TORRANCE, J.), Feb. 9, 1885, maintaining the plea of compensation in part. (See M. L. R., 1 S. C. 225 for report of the judgment in the Court below).

May 18, 1886.] *J. N. Greenshields*, for appellants:—

The present action was taken by the appellants against the respondents to recover the sum of $400.50, the proceeds of certain drafts and promissory notes placed with the respondents by the appellants for collection, and which had been collected by the respondents.

The appellants and respondents are bodies corporate and politic, and did a banking business in the City of Montreal and elsewhere. On the 15th of September, 1883, the appellants suspended payment, as provided for by sect. 57 of 34 Vict. ch 5, the appellants being at that time insolvent and unable to meet the liabilities then maturing. On the 4th of December following, the appellants were

placed in liquidation, under the provisions of the Statute 45 Vict. ch. 23, and the present action is brought by the liquidators in the name of the said bank, as provided for by the 35th section of said last mentioned Statute.

The claim of $400.50 is made up of four notes, which were given to the respondents by the appellants for collection on the 23rd of August, 1883, on the 14th of Sept., 1883, and on the 4th of August, 1883, and on the 3rd of November, 1883; and all of said notes matured only on the 4th of January, 1884, about which time they were paid to the respondents.

To this action, the respondents plead, admitting that they had collected the amounts in question, but contending that the same was compensated by a larger amount of $3,000 due by the appellants to respondents for a note upon which the appellants were liable as endorser. The appellants admit the liability on the note, but claim that compensation does not take place, in view of the insolvency of the appellants, the present action being taken by the liquidators of the appellants for the benefit of the *masse* of appellants' creditors.

The note in question pleaded in compensation by the respondents, was discounted by the respondents for the appellants on the 3rd day of June, and matured on the 4th of October, 1883, and was then renewed by the respondents. The Judge in the Court below gave judgment in favour of the appellants for $128.35, amount of the draft or note given over to respondents for collection after the suspension of the Bank appellants, but allowed compensation for the other notes which respondents had received previous to suspension.

The appellants contend that all of said notes having been placed with respondents merely for collection, and paid only at a date long after the appointment of the liquidators, no compensation can take place in favour of respondents against the rights of the other creditors of appellants, and that the only and proper course for the respondents to follow was to file a claim against the estate of the appellants as an ordinary creditor, and pay over

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to the appellants the money collected as the proceeds of the notes in question. The respondents, by a formal admission, admit that the notes in question were given by the appellants for collection.

The appellants urge the present appeal in order that the principle of compensation involved may be established by a higher Court.

The position of the appellants and the respondents on the 15th of September, 1883, the date when the appellants suspended payment, was: the respondents had a claim for $3,000, not then matured, against the appellants, the amount of the note pleaded, and the respondents held three notes of the appellants for collection, which notes did not mature until the 4th of January, 1884. On the 3rd of November, another note was given by the appellants for the same purpose.

The points of law raised by the appellants are two. (1) Could compensation take place at any time previous to the suspension of the appellants in favour of respondents? (2) Could compensation take place at any time after the suspension and insolvency of the appellants? As to the first, the appellants contend that compensation could not take place before the suspension, inasmuch as the said notes were not even the subject of compensation, and the conditions necessary for the operation of compensation did not exist at that time.

If the appellants had desired, they could have made a demand on the respondents for the delivery over of the four notes in question before they were due, and what answer could the respondents have made? They could not have pretended that these notes held by them were subject to any lien in their favour. They were not pledged as security for the payment of the $3,000, but were held as the property of the appellants, and were merely placed with the respondents for convenience in the collection of them, the respondents having branch offices at the different places where the notes were made payable. Could the respondents acquire any greater rights on the proceeds of the notes after they were paid to them than they had on

the notes themselves? After these notes had been paid to the respondents, the proceeds thereof were held by the respondents for the appellants. On the other hand, the appellants owed the respondents $3,000; but in order that compensation could take place, both these debts must be equally exigible. Did this condition then exist? The claim of the respondents against the appellants is not exigible. It is merely a claim against the assets of the company appellants, which can only be collected *pro rata* with the other creditors of the said Bank appellants.

It is clearly in evidence that the appellants were hopelessly insolvent on the 15th of September, 1883, the date of the suspension, and the result of the liquidation will be that after the payment of the full double liability on the stock, which amounts to $500,000, the creditors will only receive a portion of their claims. The effect, then, of the judgment of the Court below, will be to pay to respondents in full a part of their claim, to the damage of the other creditors of the Bank, appellants. This, the appellants urge, is contrary to the spirit and meaning of the French law, and of the insolvent and liquidation acts, which contemplate that the distribution of the assets should be made equally and *pro rata* among all the creditors, and not that preferences should be given in favour of one of the creditors over another.

J. L. Morris, for the respondents, submitted that the fact that the Bank of Commerce only collected the amounts of the notes after the liquidators had been appointed to wind up the affairs of the Exchange Bank, was of no importance. This was decided in *Miner* v. *Shaw*, 23 L. C. J. 150. Section 60, s.s. 2 of the Act respecting Insolvent Banks (45 Vict. ch. 23) is almost identical with sect. 107 of the Insolvent Act of 1875, under which it was held, in *Miner* v. *Shaw*, that compensation takes place in respect of debts falling due after the insolvency, when the transactions leading thereto began prior to such insolvency.

DORION, CH. J.:—

It is not necessary to decide whether the Exchange

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Bank was insolvent in September, 1883, or not. The Bank of Commerce did not become the creditor of the Exchange Bank until the 6th of November, when the $3,000 note was protested for non-payment. At that time, the Bank of Commerce held certain notes for collection on account of the Exchange Bank, but it was not until January, 1884, long after the insolvency of the Exchange Bank, that any of these notes were collected. At that time compensation could not take place.

RAMSAY, J.:—

There has been nothing whatever to show that the four notes were received by the Bank of Commerce as collateral security. On the contrary, there is an admission that the notes were received for collection. Under these circumstances, there could be no compensation until the amount of the notes had been collected by the Bank of Commerce, and at that time the Exchange Bank was insolvent, and the question of compensation could not arise.

The judgment of the Court is as follows:—

"The Court, etc.....

"Considering that the present action has been instituted by the liquidators of the Exchange Bank named under the provisions of the Statute 45 Vict. ch. 23 (Canada), to recover from the respondents the sum of $400.56, being the proceeds of certain drafts and promissory notes placed with the respondents for collection;

"And considering that although three of the said drafts and notes had been so placed with the respondents before the appellants became insolvent, and the fourth was given to the respondents after the said appellants had stopped payment, but before any application for the appointment of liquidators was made, yet the amount of the said drafts and notes was only collected and received by the said respondents after the appointment of the liquidators, to wit: part on the 4th of January, 1884, and the remainder on or about the 4th of February, 1884, after the insolvency of said appellants and the appointment of said liquidators had become a matter of public notoriety;

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"And considering that it is neither alleged nor proved that said drafts and notes were placed with the respondents as collateral security or otherwise for the due payment of any debt which the appellants might then owe, or which might thereafter become due by them to the respondents;

"And considering that although the appellants were, on the 6th of November, 1883, indebted unto the respondents for a sum of $3,000, being the amount of a certain promissory note which matured on that day, and was duly protested, yet the plea by which the respondents claim that the sums which they have collected for the appellants as above stated, and which are claimed by this action, were compensated by so much of the said sum of $3,000 due by the appellants to the said respondents, is unfounded, inasmuch as, by law, no compensation could take place after the said appellants had become insolvent, and that, in the present case, the parties were not mutually debtors and creditors of each other, as required by law (C.C. 1187), for any sum of money, until the respondents received the amounts collected by them for the appellants on the 4th of January and 4th of February, 1884, long after the insolvency of the appellants and the appointment of said liquidators;

"And considering that there is error in the judgment rendered by the Court below on the 9th of February, 1885;

"This Court doth reverse the said judgment of the 9th of February, 1885, and proceeding to render the judgment which the said Court should have rendered, doth condemn the respondents to pay to the appellants the sum of $400.56, with interest, etc."

Judgment reversed.

Greenshields, McCorkill, Guerin & Greenshields, attorneys for appellants.

John L. Morris, attorney for respondents.

(J. K.)

November 27, 1886.

Coram DORION, CH. J., MONK, RAMSAY, TESSIER, CROSS, JJ.

THOMAS HEFFERNAN,
(*Defendant in Court below*),
APPELLANT;

AND

MATTHEW WALSH,
(*Plaintiff in Court below*),
RESPONDENT.

Quo Warranto—C.C.P. 1016—*Jurisdiction of the Courts.*

HELD:—1. Under C. C. P. 1016, any person interested may bring a complaint in the nature of a *quo warranto*, whenever another person usurps, intrudes into, or unlawfully holds or exercises any office in any corporation, or other public body or board; whether such office exists under the common law, or was created in virtue of any statute or ordinance.

2. The jurisdiction of the courts of justice cannot be ousted save by express words in the statute incorporating such public body, and a mode of appeal provided by the by-laws does not, therefore, deprive the members of their recourse before the ordinary tribunals.

3. The members of such body cannot be deprived of their votes for non-payment of fines exigible under by-laws, without first having had an opportunity to give their reasons why the fines should not be imposed, and further, without the fines having been formally pronounced.

The appeal was from a judgment of the Court of Review, Montreal, November 30, 1885 (TORRANCE, BOURGEOIS, MOUSSEAU, JJ.), reversing a judgment of the Superior Court (MATHIEU, J.), October 3, 1885, and annulling the election of appellant as first vice-president of the St. Bridget's Total Abstinence and Benefit Society.

The question in the case was whether Mr. Heffernan, the present appellant, was duly elected vice-president of the St. Bridget's Total Abstinence and Benefit Society on the 4th January, 1885. The election in question was for one year. The society is a benevolent society, and members are not entitled to vote at an election of officers un-

less they have paid all dues. In 1883, an amendment was passed to the following effect: "That members, to "be entitled to vote at the annual elections of officers, "must be clear on the books, of all constitutional dues "and fines at the monthly meeting of December in each "year." On the 4th January, 1885, the voting for that year took place. Heffernan and Walsh were nominated for the office of first vice-president, and it appeared that Heffernan had received 73 votes, and Walsh 69. The friends of Walsh protested while the election was going on, that illegal votes were being received. What took place is thus recorded in the minutes: "The rev. director here "left the hall, and the list of voters was called. Some "objection being made to certain members, who were "called, as not being qualified, the meeting became very "noisy, when the reverend director re-entered the hall "and took a seat on the platform. The calling of the roll "was then proceeded with; several parties were objected "to as not being qualified, but the rev. director said it "would be looked into after the election." Subsequently, the rev. director dismissed the appeal of Walsh against the return of Heffernan, on the ground that "it was be-"yond his jurisdiction, not having been made by a mem-"ber of the St. Bridget's Total Abstinence and Benefit "Society, whose wrongs or rights as a member were to "be judged by the rev. director."

A complaint in the nature of a *quo warranto* was then brought by Walsh, praying that the election of Heffernan be annulled, and that the petitioner be declared duly elected.

Mr. Justice Mathieu, in the Court of first instance, dismissed the action, on the ground that the decision of the rev. director was final under the by-laws. The question of the validity of the votes was not entered into.

The case was then taken to the Court of Review, where the first judgment was reversed, and the election of Heffernan was annulled on the ground that eleven illegal votes had been received for him, the deduction of which left him in the minority.

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The judgment in Review is in the following terms:—

"La Cour, après avoir entendu le défendeur, Thomas Heffernan, et le demandeur par leurs avocats respectifs, sur la demande du dit demandeur pour faire réviser le jugement prononcé dans cette cause par la Cour Supérieure siégeant dans le district de Montréal, le 3 octobre dernier, (1885); avoir examiné la procédure et le dossier et délibéré;

"Attendu que le demandeur requérant a intenté cette poursuite pour faire annuler l'élection du défendeur, Thomas Heffernan, comme premier vice-président de la société dite "St. Bridget's Total Abstinence and Benefit Society," laquelle élection a eu lieu le 4 janvier 1885, le dit demandeur ayant été mis en nomination pour la dite charge en même temps que le dit Heffernan;

"Attendu que le dit demandeur allègue que la majorité du dit Heffernan n'a été due qu'à des votes illégaux et irréguliers, et que la majorité des votes réguliers était en faveur du dit demandeur;

"Attendu que le dit défendeur Heffernan a plaidé, alléguant qu'il est régulièrement élu, et que par l'article 17 des règlements de la dite société, le demandeur se croyant lésé par la dite élection, devait se pourvoir non par une action devant les tribunaux civils, mais par un appel au directeur de la dite société; que le dit demandeur a fait cet appel mais seulement après l'expiration des délais fixés par les règlements, et que son appel a été en conséquence rejeté;

"Considérant que le dit article 17 ne comporte aucune renonciation au recours aux tribunaux qui appartient de droit à tout membre d'une société incorporée, qui se trouve lésé dans ses prérogatives essentielles;

"Considérant que l'appel au révérend directeur n'est pas obligatoire, mais purement facultatif, et que cet appel facultatif ne se rapporte qu'à des questions secondaires, comme ordre, procédure, etc.;

"Considérant que dans le cas actuel le recours aux tribunaux a été nécessité par la conduite du révérend direc-

teur qui n'a pas voulu, sous un prétexte frivole, s'occuper de l'appel du demandeur ;

" Considérant qu'il est en preuve que onze membres non-qualifiés ont voté à la dite élection, savoir : Thomas O'Neil, John Saunders, Thomas McCambridge, William Frazer, Peter Quinn, Redmond Byrne, John B. Mason, William Turner, Michael Cuddy, Robert Richardson and P. J. Ford ;

" Considérant que la majorité de Heffernan n'étant que de sept, ce nombre de votes illégaux est plus que suffisant pour autoriser la Cour à annuler son élection ;

" Considérant qu'il y a erreur dans le dit jugement du 3 octobre dernier, qui a renvoyé l'action du demandeur ;

" Casse et renverse le dit jugement, et procédant à rendre celui qui aurait dû être rendu par la dite Cour de première instance, annule la dite élection du dit défendeur, Heffernan, comme premier vice-président de la dite société, "The St. Bridget's Total Abstinence and Benefit Society," et condamne le dit défendeur Heffernan, à payer les dépens, tant de la Cour de première instance que de cette Cour de Révision, distraits, etc."

Sept. 17, 1886.] *R. Laflamme, Q. C.*, and *C. J. Doherty*, for the appellant, submitted, on the point on which the judgment turned in appeal :—

Appellant's second plea puts in issue, the pretension of respondent that appellant was not legally elected to the office of first Vice-President of the St. Bridget's Society, owing to a number of those who voted for him not being qualified so to do.

The main question raised by this plea is whether or not it has been proved that more than seven persons [that being the majority of votes by which appellant was declared elected] who were disqualified, voted at the election in question, and may have voted for appellant. It may be remarked here that the judgment of the Court below does not give the office in dispute to respondent, he not having succeeded in proving for whom the persons he claims to have been disqualified voted. It however finds that eleven disqualified persons voted at the

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election in question, and inasmuch as this number is greater than appellant's majority, declares his election null.

The eleven voters so declared to have been disqualified, are:—Thomas O'Neil, John Saunders, Thomas McCambridge, William Fraser, Peter Quinn, Redmond Byrne, John B Mason, William Turner, Michael Cuddy, Robert Richardson and P. P. J. Ford. Of these persons seven, to wit, O'Neil, Saunders, McCambridge, Fraser, Quinn, Byrne and Mason, were by respondent's bill of particulars alleged to be disqualified by reason of their having been absent from the *Fête Dieu* Procession, and not having paid a fine therefor; one, Cuddy, because of absence from both the Fête Dieu and St. Patrick's Day processions, and not having paid fines therefor; one, Turner, by reason of non-payment of monthly dues, and two, Ford and Richardson, by reason of non-payment of monthly dues, and absence from the *Fête Dieu* Procession, and failure to pay fines therefor. Of the total number only three are pretended to be disqualified for non-payment of dues; the disqualification of the eight others rests solely on the non-payment of fines alleged to have been incurred for non-attendance at processions. Now, what is the evidence with regard to these eight? It is, making the very most of it, merely that the Secretary, going through the ranks of the society on the occasions of these processions, did not see them there at some one of the processions, and put them on a list in consequence. Now, under the Constitution and By-Laws, and by law, does this show they had become indebted for a fine, in other words that they had been fined and thereby forfeited their membership? Appellant submits it does not.

Article XXIX of the constitution is that dealing with fines. It reads as follows:—"Members neglecting to attend to the following duties or any of them shall be "fined in the sum set opposite the offence."—"6. Neglecting to attend the national procession of St. Patrick's "Day or the procession of Corpus Christi, twenty-five "cents. Exemptions being made in favor of members

" who through sickness or infirmities or absence from the " City could not attend."

This article merely provides that a member being absent, and not having one of the reasons above enumerated for such absence, shall be fined. It makes him liable to have a fine imposed upon him, it specifies the penalty that is imposable for such default without cause. But that penalty has to be inflicted by the authority of the society. The member who is absent without reason is liable to be fined, but he does not *de facto* owe a fine. The society has a right to fine him, but before he becomes its debtor, it must exercise that right, it must inflict the penalty and this after affording the person to be punished, opportunity to be heard in his defence. It is an elementary principle that no man can be punished without being put on his defence; that before the penalty can be inflicted, and more especially a penalty such as that in question in this case, whose effect is to deprive the member of the exercise of his most important privilege as such, there must be some species of trial, affording opportunity to the person charged to make a defence. Was anything of the kind done here? It is not even pretended that there was. No pretence is even made that the society or any authorized officer ever exercised, even without affording an opportunity for a hearing to any of these members, its right to impose a fine. The Secretary merely takes the names of those whom, at some moment of a procession lasting for hours, he does not perceive in the society's ranks, and puts that list in his pocket. Nothing is said to the person whose name is so taken down. No notice is given him, no explanation asked, and the first he hears of it, is, after he has voted, he is told, for the first time, you owe a fine which ought to have been paid a month ago, and because you did not pay it, though you knew nothing of it, your vote shall be null. This too, although the member so voting was called out from the regular roll of members. Surely such a pretension is so extravagant as in its very statement to carry its refutation. There is then no proof that the persons above mentioned were

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ever fined. But, is there evidence that they were even liable to be fined? None whatever.

It is merely endeavored to be shown that they were absent from the processions in question. But that fact in itself was not enough to make them subject to be fined. Something more was necessary, they must have been so absent without sufficient reason, that is, not being through sickness, infirmities or absence of the City, unable to attend. It was necessary then to have established that these persons not merely were absent, but further that they were not within the exceptions. Nothing of the kind has been attempted.

Not only does it appear that these persons were never fined, but it does not even appear that they were liable to be fined. How then, can they be held disqualified for non-payment of a fine never imposed on them, and to which it is not even shown they were liable.

H. Mercier, Q. C., for the respondent.

RAMSAY, J. (for the Court) :—

The appellant was elected first vice-president of "St. Bridget's Total Abstinence and Benefit Society," and respondent petitioned to have his election declared null, on the ground of the illegality of sufficient votes to place appellant in a minority of the votes cast, or at any rate to render it uncertain whether he had a majority of votes or not.

This petition was met by several pleas. First, it is said that no writ of *quo warranto* would lie at common law to question the occupation of an office in a private company. It signifies not whether this proposition be correct or not. Art. 1016, C. C. P., enacts that any person interested may bring a complaint whenever another person usurps, intrudes into or unlawfully holds or exercises any office in any corporation, or other public body or board, whether such office exists under the common law, or was created in virtue of any statute or ordinance, and the writ of *quo warranto* is assimilated to any ordinary writ of summons. We have decided this point already

once this term in the case of *Gilmour & Hall* (1) in this sense.

It was also pleaded that a by-law of the society, recognized by statute, gave an appeal to the director of the institution, whose decision was to be final. It has been held over and over again by this Court, that the jurisdiction of the Courts could not be ousted save by express words.

On the merits it seems that the objection taken to the voters is, that they were not qualified to vote if they owed any dues or fines, and that a certain number of members (sufficient to turn the fate of the election) had voted, who had become liable to be fined for the alleged omission to perform certain duties imposed on them by the rules of the society, unless within one or other of certain exceptional cases. It does not appear that these persons were ever called to account for these omissions, or that the fines were imposed. I don't think this is a disqualification, and therefore I think the election must stand.

It seems that on two occasions we have decided this matter of fines in this sense.

We are to reverse.

The judgment is recorded as follows :—

" La Cour, etc.....

" Considérant qu'à l'élection qui a eu lieu le 4 janvier 1885, d'un membre de la Société d'Abstinence Totale et de Bénéfice de Ste. Brigitte (St. Bridget's Total Abstinence and Benefit Society), pour choisir un premier vice-président de la dite société, l'appelant, Thos Heffernan, ayant obtenu une majorité de sept votes sur l'intimé, son concurrent, a été déclaré élu par le président de l'assemblée ;

" Et considérant que l'appel donné par la constitution et les règlements de la société au directeur de la société, ne prive pas ceux d'entre les membres qui sont lésés, de leur recours devant les tribunaux ordinaires, et que l'intimé avait le droit de se pourvoir devant la Cour Supérieure pour faire adjuger sur la validité de la dite élection ;

(1) *Ante*, p. 374.

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"Mais considérant qu'il n'est pas prouvé que les nommés Thomas O'Neil, John Saunders, Thomas McCambridge, Wm. Frazer, Peter Quinn, Raymond Byrne, John B. Mason, Wm. Turner, Michael Cuddy, Robt. Richardson et P. J. Ford étaient déqualifiés à voter à la dite élection pour n'avoir pas payé lors de la dite élection certaines amendes que l'intimé prétend qu'ils avaient encourues pour infraction aux règlements de la dite société ;

"Et considérant qu'il n'est pas prouvé que ces prétendues amendes aient jamais été prononcées contre les membres ci-dessus nommés de la dite société, ni qu'ils aient jamais été requis de donner leurs raisons pour lesquelles ces amendes ne leur seraient pas imposées conformément aux règlements de la dite société, et qu'en conséquence ils ne devaient pas ces amendes lors de la dite élection, et n'étaient pas déqualifiés à voter pour l'élection d'un premier vice-président de la dite société ;

"Et considérant que l'appelant a été élu premier vice-président de la dite société par la majorité des membres présents à la dite assemblée qui avaient le droit de voter à la dite élection ;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal comme Cour de révision le 30e jour de novembre 1885 ;

"Cette Cour casse et annule le dit jugement du 30 novembre 1885, et confirmant le jugement rendu par la Cour Supérieure à Montréal le 3e jour d'octobre 1885, renvoie la demande ou requête libellée du dit intimé, et le condamne à payer à l'appelant les frais encourus tant en Cour de première instance qu'en Cour de révision, et sur le présent appel. (*Dissentiente* l'hon. M. le juge TESSIER)."

Judgment of C. R. reversed.

Doherty & Doherty, attorneys for appellant.

Mercier, Beausoleil & Martineau, attorneys for respondent.

(J. K.)

September 21, 1886.

Coram DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.

GEORGE STEPHEN ET AL.,

(*Opposants in Court below*),

APPELLANTS;

AND

LA BANQUE D'HOCHELAGA,

(*Plaintiff contesting opposition*),

RESPONDENT.

Railway—Execution—Seizure of Part.

HELD:—That a railway cannot be seized and sold in part, even on a judgment by bondholders, except in accordance with the dispositions of the special statute authorizing the creation of the mortgage or hypothec. A railway is an indivisible thing, and can only be sold as a whole.

The judgment appealed from, whereby opposants' opposition was dismissed on demurrer, was rendered in the Superior Court, Montreal, on the 29th of December, 1884 (MOUSSEAU, J.), as follows :—

"La Cour, après avoir entendu les opposants et la demanderesse par leurs avocats, sur la contestation en droit de l'opposition; avoir examiné la procédure et délibéré;

"Considérant que l'allégation que l'on a fait un prolongement à la voie ferrée saisie en cette cause depuis la saisie, et que l'on ne doit pas en conséquence procéder à la vente de la partie saisie, ne fournit pas matière à une opposition;

"Considérant que la dite opposition est mal fondée en droit; maintient la dite contestation, et renvoie la dite opposition, avec dépens, distraits, etc."

May 25, 1886.] *O'Halloran*, Q. C., for appellants :—

The plaintiff having obtained a judgment against the Montreal, Portland & Boston Railway Company, seized in execution :

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"That part of the Montreal, Portland & Boston Railway, "formerly known as being the Montreal, Chambly and "Sorel Railway, situate and being in the counties of "Chambly, district of Montreal, of Rouville, district of "St. Hyacinthe, county of Iberville, district of Iberville, "and in the county of Missisquoi, district of Bedford, "reaching from its junction with the Grand Trunk Rail-"way, in the parish of St. Antoine de Longueuil, in the "concession called la Grand Ligne, to and on lot of land "number nine in the second range of the township of "Stanbridge in the said county of Missisquoi, district of "Bedford; being a strip of land of sixty-six feet in width "by a length of about forty-three miles, more or less, "English measure."

The railway in question commences at the town of Longueuil, extending to Chambly, Marieville, West Farnham, Stanbridge, Frelighsburg, to the province line on the Vermont frontier in St. Armand East, a distance of about sixty-seven miles. It is shewn by the *procès-verbal* of seizure, that only a "part" of the railway is seized, to wit, that part, beginning at its junction with the Grand Trunk Railway, about four miles from Longueuil, its northern terminus, and terminating at Stanbridge, about twelve miles short of its southern terminus; that is to say, the part seized is about forty-three miles, of the middle of the railway, beginning at no station, and ending at no station, leaving a piece at both ends as well as a branch of nine miles, between Marieville and St. Césaire, unseized.

The opposants are bond holders, mortgage creditors of the railway. It is evident from the fact that the Railway Company are allowing the railway to be sold on an execution for some three or four thousand dollars, that the company is hopelesly insolvent, and it is so alleged in opposants' opposition.

It is clear, that in the present case, the opposants, as mortgage creditors, can urge all grounds of opposition pertaining to the judgment debtor. The judgment debtor is entitled to have his property sold to the best possible

advantage. A railway is an indivisible immoveable as much as a dwelling house. If it can be seized in parcels, why seize and advertise to sell *en bloc*, forty-three miles of railway on an execution for $4,000? Why not advertise to sell only so much as may be sufficient to satisfy the execution? This would be absurd.

It is true, the railway was not all completed at the time of the seizure. But the respondent did not seize all that was then completed, as is alleged in the opposition. At the time of the seizure, the four miles between the Grand Trunk Junction and Longueuil was completed but has not been included in the seizure; since the seizure, the entire railway has been completed, together with a branch of nine miles between Marieville and St. Césaire.

The contention of the appellants is, that the railway being an indivisible immoveable, it should be seized, if seizable at all, in such manner as not to destroy its entity. The seizure should comprise not only its property, but its rights and privileges, its franchise and potentiality, that the *adjudicataire* may not only acquire all the rights pertaining to the railway, but also the duties and obligations incumbent upon it. If sold in the manner proposed, the *adjudicataire* may convert it to what purpose he pleases; may tear up the rails, and convert the roadway into a cabbage garden.

The opposants allege, that the bonds which they hold cover the entire railway, seized and not seized, and that if the part seized only is sold, as now advertised, the railway will be dismembered, its value as a through line of railway destroyed, the property will be rendered comparatively valueless, and will not realize to its creditors anything like the amount it would realize if sold in its entirety, its franchise will be valueless, and the rights of the public for which the charter mainly was granted, as well as the large subsidy contributed by the government, completely sacrificed.

Opposants do not object to the sale of the railway, but oppose, to the end that when sold, it be sold in its entirety, as an indivisible immoveable, and not in parcels,

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and also that when sold it shall be sold as a railway, a creature of the law, with rights and duties, and not as a tenement house, which may be converted into a church or a mill, at the will of the purchaser.

J. C. Hatton, Q. C., and *F. L. Béique*, Q. C., for respondents :—

Under article 664, Code de Procédure, "the execution "of a writ of *venditioni exponas* cannot be stopped by oppo- "sition, unless for reasons subsequent to the proceedings "by which the sale was stopped in the first instance." Here, moreover, the opposants specifically alleged that *the grounds of the present opposition are subsequent to the proceedings by which the sale was stopped in the first instance.* The said opposition is therefore based exclusively on the fact of extensions having been made to the line of railway in question, subsequent to the seizure.

The fact of such extensions having been made subsequently to the seizure herein might possibly have justified a demand for a special order of the Court authorizing the sale of said extensions concurrently with the portion of the line of said railway seized, but could in no way be a ground for an opposition *afin d'annuler*. It seems to be manifest that a seizure which was regular at the time it was made, cannot become void through any subsequent action on the part of a defendant.

RAMSAY, J. :—

This is an appeal from a judgment of the Superior Court dismissing an opposition *afin d'annuler*, on the ground that it was not founded in law.

Before examining that question, it is necessary to dispose of another question which was urged before us, namely, that the opposition came too late. Strictly speaking, this is true; but the opposition was allowed to be filed by the court below, and we think under the circumstances it was rightly admitted into the record.

The seizure was of a part of a railway, and the question was as to whether a portion of a railway could be taken in execution in this way. On the merits, we are with

appellant. In the case of *Drummond & South Eastern Railway company* (1) the question was whether a railway could be sold at the suit of the holder of mortgage bonds made in conformity with a statute allowing the railway to be mortgaged to secure the payment of these bonds; and we held that it could be sold. In England, under a statute somewhat similar to ours, the courts have always held that it was the railway as a railway that was mortgaged, and that the sale could not operate the destruction of the corporation. We fully recognized that this is what the statute should have said; but we felt that under the terms of our statute, such an interpretation would destroy the security given to the bondholder by the statute, and therefore we held that the railway could be seized in execution of a judgment obtained by a bondholder. In this case, we have to decide whether a railway can be seized as a strip of land. We think not. It is an indivisible thing, and can only be sold as a whole. Since our judgment in the case referred to, Parliament, evidently seeing the difficulty as to the form of words in use here, recognizes the power to take in execution of a judgment obtained at the suit of a bondholder, the whole or a section of a railway specially mortgaged for the payment of the bonds, and provides what the effect of this sale shall be: 46 Vic., c. 24, sections 14, 15 and 16.

We think, therefore, that the judgment must be reversed and the seizure declared null; but as the opposition is filed too late, thus putting the respondent to considerable costs, the judgment will be reversed without costs.

The judgment is in the following terms:—

"The Court, etc.

"Considering that the opposition *afin d'annuler* in this case made by appellants, has been allowed to be filed by the court below; and considering that the said opposition is well founded in law, and that a railway cannot be seized and sold in part, even on a judgment by bondholders, except in accordance with the dispositions of the

(1) 24 L. C. J. 276.

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special statute authorizing the creation of such mortgage or hypothec;

"And considering there is error in the judgment of the Superior Court, to wit, in the judgment of the 29th December, 1884, doth reverse the same, and proceeding to render the judgment which ought to have been rendered, doth maintain the said opposition, and doth grant *main levée* of the seizure in the said opposition mentioned. But considering that the said opposition was filed after the expiration of the usual and legal delays, to the cost and inconvenience of the party respondent, the said opposition is dismissed, each party paying his own costs, as well in the court below as in this Court."

Judgment reversed.

O'Halloran & Duffy, attorneys for Appellants.

Hatton & Kavanagh, attorneys for Respondent.

(J. K.)

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ACCOUNT CURRENT.

Accounts rendered yearly—Acquiescence.] Where an account current was rendered each year during a long series of years, charging commissions as well as interest, and the debtor, being pressed to close the account, without formally admitting or denying the right to charge such commissions, continued to remit sums on account, which remittances (if commissions should not have been charged) were more than sufficient to pay the claim, it is a fair inference that the debtor acquiesced in the rate of commissions as charged, and he is obliged to settle the balance of the account on that basis. *Dudley & Darling*, 458.

ACQUIESCENCE.

See ACCOUNT CURRENT, 458; ARBITRATION, 238; PRINCIPAL AND AGENT, 64.

ACTION.

Damages for unauthorized sale of shares.] An action of damages setting forth, in effect, that a bank, to which plaintiff had transferred certain shares as collateral security for an advance, had, without right, and against the will of plaintiff, sold the shares at a third of their value, on purpose to injure the plaintiff, is not demurrable because the plaintiff has not offered defendant the alternative to substitute other shares. *Gilman & Campbell*, 291.

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Damage caused by.] *See* RESPONSIBILITY, 133.

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See PROCEDURE, 1.

To Supreme Court.] *See* PROCEDURE, 159.

ARBITRATION.

Irregularities—Acquiescence.] Where the parties agreed to submit their differences to arbitrators and mediators, and notwithstanding serious irregularities on the part of the mediators, proceeded with the arbitration, it was too late to complain of the irregularities after the award was rendered. *Rolland & Cassidy*, 238.

ASSAULT.
See DAMAGES. *Measure of*, 107.

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Notes received by Bank for collection.] *See* COMPENSATION, 476.

BANK IN LIQUIDATION.
See INSOLVENT BANK, 409.

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BREWER'S LICENSE.
See CONSTITUTIONAL LAW, 381.

BROKER.
See GAMING CONTRACT, 170.

CAPIAS.
Special bail under C. C. P. 824—Statement and declaration under C. C. P. 766.] *Held*, (approving *Poulet* v. *Launière*, 6 Q. L. R. 314), that a defendant who has given special bail under C. C. P. 824, is not bound to file a statement and make the declaration mentioned in articles 764-766 C. C. P., and cannot be in contempt for failing to do so. *Vineberg & Ransom*, 345.

CARRIER.
Injury to Passenger.] A company engaged in the conveyance of passengers is responsible for injuries sustained by a passenger while being carried in the company's vehicle, unless it be proved by the company that it was impossible for them to prevent the accident. *Montreal City Passenger Ry. Co. & Irwin*, 208.
See RAILWAY COMPANY.

CASHIER OF BANK.
Acquiescence in Act of.] *See* PRINCIPAL AND AGENT, 64.

CHARTER PARTY.
Deviation from course of voyage.] *See* SHIPPING, 420.

COMMERCIAL TRAVELLER.
Privilege of.] *See* PRIVILEGES AND HYPOTHECS, 466.

COMPENSATION.
Damages suffered by tenant.] Where a tenant was entitled by a clause of the lease, to become proprietor of the premises leased on payment of a specified sum, it was held that he could not plead to an action of ejectment, that said sum was compensated by damages suffered by him through the interruption of his business. *Bell & Court*, 80.
Notes received by Bank for collection.] Where drafts and notes were placed with a bank by a debtor of the bank, not as colla-

COMPENSATION—*Continued.*

teral security, but for collection, compensation does not take place until the bank has received the amounts collected by them on such notes; and in the present case, the debtor having become insolvent before any amounts were received on such notes, compensation did not take place between the amount collected by the bank and the debt due to it. *Exchange Bank of Canada & Canadian Bank of Commerce*, 476.

CONSIGNEE.

See PRINCIPAL AND AGENT, 340.

CONSTITUTIONAL LAW.

Brewer's license.] The power of the Dominion Parliament to legislate as to the regulation of trade and commerce does not prevent the local legislature from passing an Act obliging a brewer to take out a local license permitting him to sell beer or ale manufactured by him, whether he sells such beer at his brewery, or elsewhere by a person paid by a commission on the sales; and therefore the Quebec License Act, 41 Vic. ch. 3, is constitutional. *Molson & Lambe*, 381.

CONTEMPT OF COURT.

Term of imprisonment.] A commitment for contempt until otherwise ordered by the Court is irregular: it should be for a specified time or until the person conforms to the order which he disobeyed. *Vineberg & Ransom*, 345.

See CAPIAS, 345.

CONTRAINTE PAR CORPS.

See HABEAS CORPUS, 405.

CORPORATE OFFICE.

See USURPATION OF CORPORATE OFFICE, 374, 482.

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COUNSEL FEE.

Fee paid to Counsel for advice.] A fee paid to counsel for advice will not be allowed as part of the damages for breach of contract. *Cox & Turner*, 278.

CROWN LANDS.

Cancellation of sale.] *See* LOCATION TICKET, 316.

DAMAGES.

Anguish of mind.] An instruction to the jury, that anguish of mind suffered for the loss of a husband may properly be taken into consideration by them in estimating the damages which should be allowed to the widow, is not misdirection. *Robinson & C. P. R. Co.*, 25.

Measure of.] Where there is a right of action for a trifling as-

DAMAGES—*Continued.*

sault, and no material damage has been done, and the person assaulted refuses all settlement, and begins and then abandons a prosecution before a magistrate, in order to bring an action of damages, the Court will reduce damages which have no reasonable measure to such a sum as would be imposed as a fine by a magistrate. *Papineau & Taber*, 107.

For false arrest.] *See* FALSE ARREST, 365.

Indirect damages suffered by tenant.] *See* LESSOR AND LESSEE, 80.

Unauthorized sale of shares.] *See* ACTION, 291.

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See MUNICIPAL DEBENTURES, 160.

DOMICILE.

Matrimonial.] To constitute a matrimonial domicile there must be the fact of residence coupled with the intention to remain in the place. Where the husband declared by the act of marriage that his domicile was in Quebec, such declaration in the presence of the officer who performed the ceremony, and whose duty it was to ascertain and set forth the domicile of the parties married, must be considered a formal declaration of intention sufficient to establish the matrimonial domicile. *Wadsworth & McCord, & McMullen*, 113. (Reversed by Supreme Court).

EJECTMENT.

See LESSOR AND LESSEE, 379.

ELECTION.

Benefit Society.] Where the bylaws of a benefit society provided that members should not be qualified to vote if they owed any dues or fines, the fines must be imposed before members can be deprived of their votes. *Heffernan & Walsh*, 482.

EVIDENCE.

Onus probandi.] *See* MASTER AND SERVANT, 243.

EXECUTOR.

Grounds for Removal from office.] Where testamentary executors transferred the control of the estate to another person, who paid the monies belonging to it into a bank in his own name, and afterwards drew them out, the executors were properly removed from office by the Court below, even without evidence of fraudulent intention or actual dissipation of the property. *French & McGee*, 59.

EXPERT.

Appointment of one Expert.] *See* PROCEDURE, 56.

FOREIGN JUDGMENT.

See PRESCRIPTION, 439.

GAMING CONTRACT.

1. *Broker not disclosing principal.*] Where a broker, knowing the nature of the transactions, acts for a person contracting to deliver grain at a future date, (but without intention to make actual delivery), and the broker discloses no purchaser or principal, he will be considered the principal as regards the party contracting to deliver, and no action will lie by the broker for the recovery of a deficiency upon the transaction. *Macdougall & Demers*, 170.
2. *Speculative transactions.*] Time bargains are not necessarily illegal, nor does the law refuse to enforce them if they are made for serious transactions intended to be fulfilled, although it may happen, contrary to the expectation of the parties, that they are not really carried out as contemplated, but from unforeseen causes come to be settled by differences. But if, in contemplation of the parties, they are at their inception intended to be speculative transactions, to be settled by adjustment of prices according to the rise or fall of the market, and not by delivery of the subjects bought or sold, they become gambling transactions, and, under C. C. 1927, there is no right of action for the recovery of money claimed thereunder. *Macdougall & Demers*, 170.

GARNISHMENT.

See PROCEDURE.

HABEAS CORPUS.

Process in civil matters.] A person, imprisoned under a writ of *contrainte par corps* for failing to produce effects of which he had been appointed guardian, petitioned for a writ of *habeas corpus*, on the ground that the warrant under which he was committed, contained no enumeration of the effects he was required to produce. *Held*, that the petitioner being imprisoned under process in a civil matter, the Court had no authority to grant a writ of *habeas corpus*. (C. C. P. 1052.) *Ex parte Ward*, 405.

HOTEL-KEEPER.

Responsibility of, for negligence of guest.] *See* RESPONSIBILITY, 133.

ILLEGAL ARREST.

Probable cause.] Where the respondent converted to his own use certain straw bought by him with money furnished to him by appellant and intended for appellant's benefit, there was probable cause for his arrest. *Copeland & Leclerc*, 365.

Complaint dismissed for defect of jurisdiction.] Where a person lays an information before a justice of the peace, that a crime has been committed for which such justice has general jurisdiction, and the justice grants a warrant upon which the accused is arrested, but he is afterwards discharged upon the ground that

ILLEGAL ARREST—*Continued.*

the justice had no authority in that particular case, the complainant, if he had probable cause, is not liable in damages for illegal arrest and imprisonment. *Copeland & Leclerc*, 365.

IMPUTATION OF PAYMENTS.

Payments imputed first on the interest.] Where the credits for each year, in an account current, are in excess of the amount of interest charged for the year, it cannot be pretended that compound interest has been charged, inasmuch as (under C. C. 1159) payments made by a debtor on account are imputed first on the interest. *Dudley & Darling*, 458.

INSCRIPTION FOR ENQUÊTE.

See PROCEDURE, 110.

INSOLVENCY.

See COMPENSATION, 476.

INSOLVENT BANK.

Cheques paid after suspension—Recourse of liquidators.] The respondent, having funds to his credit in a bank which had suspended payment, drew cheques on the bank for various sums. These cheques were accepted by the bank on the same day, and the respondent then, for valuable consideration, disposed of them to various parties who were paid the respective amounts by the bank, by credits or otherwise. *Held*, that the bank had no action against the respondent to recover the amount of the cheques so paid, their recourse, if any, being against the parties to whom they had paid the money. *Exchange Bank of Canada & Hall*, 409.

INSOLVENT TRADER.

Departure after making assignment.] The fact that an insolvent trader has made a voluntary assignment of his estate, does not justify his departure from the country without the consent of his creditors. It is his duty to be present, in order to give such information as may be required for the realization of his assets, and his departure without explanation is ground for the issue of a *saisie-arrêt* before judgment. *Heyneman & Harris*, 466.

INSURANCE, FIRE.

1. *Consent to arbitration.*] The consent by the company to an arbitration for the assessment of damages is a waiver, under 43 Vict. (Q.) ch. 62, s. 44, of nullities known to the company before the appointment of experts. *Cie. d'Assurance & Villeneuve*, 89.
2. *On household effects.*] Where an insurance was effected on a house, summer kitchen, and shed, with all the household effects "contained in said house," the insurance covered effects which had been temporarily removed from the house to the kitchen and shed, but were still on the premises insured. *Cie. d'Assurance Mutuelle & Villeneuve*, 89.
3. *Powers of agent.*] The agent of an insurance company has no authority to accept an insurance and give a receipt for the pre-

INSURANCE, FIRE—*Continued.*

mium in exchange for a receipt for his individual debt to the person insuring, and such act on his part will not bind the company. *Citizens Ins. Co. & Bourguignon*, 22.

4. *Title of Institute.*] A *grevé de substitution* is entitled to insure the property which he possesses, as "proprietor." *Compagnie d'Assurance Mutuelle & Villeneuve*, 89.

INSURANCE, LIFE.

Increase of risk—Change of habits.] The application, after the usual answers and declarations, contained an agreement that should the applicant become as to habits so far different from the condition in which he was then represented to be as to increase the risk on the life insured, the policy should become null and void. The policy stated by its terms that if any of the "declarations and statements" made in the application should be found in any respect untrue, the policy should be null and void. The applicant stated himself to be of temperate and sober habits. It was proved that he became intemperate during the year preceding his death. *Held*, 1. That the applicant's agreement as to change of habits was included among the "declarations or statements" of the application, and as such became an express warranty. 2. That the contract thus formed was valid, and became binding on the assured and his assignee. 3. That in order to void this contract it was sufficient to prove that the change of habits of assured was such as to increase the risk on his life, even though death were not proved to have resulted therefrom. 4. That in the present case, a change of habits was proved which in its nature increased the risk on the life insured. *Boyce & The Phœnix Insurance Co.*, 323.

JUDICIAL SALE OF MOVEABLES.

Nullity.] A judicial sale of moveables may be set aside for irregularities in the proceedings as well as for fraud and collusion; and where a piano not the property of defendant was seized and sold as belonging to him, for an insignificant part of its value, and the owner had no knowledge of such seizure, and it further appeared that there was no bidder at the sale, except the person who purchased the piano, it was held that the sale was a nullity, and that the owner was entitled to revendicate the property. *Nordheimer & Leclaire*, 446.

JURISDICTION.

1. *Of Provincial Legislatures.*] *See* CONSTITUTIONAL LAW, 381.
2. *Jurisdiction of the Courts.*] The jurisdiction of the Courts cannot be ousted save by express words in the statute. *Heffernan & Walsh*, 482.

JURY TRIAL.

1. *Anguish of mind.*] An instruction to the jury, that anguish of

JURY TRIAL—*Continued.*

mind suffered for the loss of a husband may properly be taken into consideration by them in estimating the damages which should be allowed to the widow, is not misdirection. *Robinson & C. P. R. Co.*, 25.

2. *Exclusion of evidence.*] Where a witness arrived after the evidence at the trial was closed, but before the jury were charged, the exclusion of his testimony was held not in itself a sufficient ground for allowing a new trial; but the relevancy and importance of the evidence which the witness was prepared to give will be taken into consideration. *Robinson & C. P. R. Co.*, 25.

3. *Partiality of juror.*] The fact that one of the jury, in the course of the trial, put a question to a witness which appeared to indicate a leaning to the side of the plaintiff, and the further circumstance that the jury presented the plaintiff with their own fees after the verdict was given, are not such indications of bias or partiality as to constitute grounds for a new trial. *Robinson & C. P. R. Co.*, 25.

LEGACY.

Revocation of.] *See* WILL, 349.

LESSOR AND LESSEE.

1. *Damages.*] The damages which a tenant can claim for non fulfilment of a condition of the lease must be the immediate and direct consequence of such inexecution. *Bell & Court*, 80.

2. *Ejectment by proprietor of undivided half.*] A proprietor *par indivis* has a right to bring an action of ejectment against a person holding the property solely by the will of the co-proprietor. *Stearns & Ross*, 379.

3. *Interference with lessee's enjoyment of premises.*] Where the lessor, in making repairs to the leased premises, used material which emitted a disagreeable odour and damaged the stock of the lessee, a grocer, held, that the latter was entitled to have the lease rescinded and to recover the amount of damages sustained by him. But in such circumstances the more regular course is that the lessee should put the lessor *en demeure* to remove the cause of damage, before bringing an action in resiliation of the lease and to recover damages. *Daigneau & Levesque*, 205.

LICENSE ACT (QUEBEC).

Brewer's License.] *See* CONSTITUTIONAL LAW, 381.

LITIGIOUS RIGHT.

Sale of.] C. C. 1584 § 4, which states that "the provisions of C. C. 1582 do not apply when the judgment of a court has been rendered affirming the right," refers to a judgment upon the particular demand in litigation, and not to a judgment affirming another right of a similar character. *Brady & Stewart*, 272.

LOCATION TICKET.

Cancellation of.] A location ticket of certain lots was granted to G. C. H., in 1863. In 1874, the Commissioner of Crown Lands registered a transfer of the location ticket from G. C. H. to respondent. In 1878, the Commissioner cancelled the location ticket for default to perform settlement duties. *Held*, that the registration by the Commissioner, in 1874, of the transfer to respondent, was not a waiver of the right of the Crown to cancel the location ticket for default to perform settlement duties, and the cancellation was legally effected. *Ross & Holland*, 316.

MASTER AND SERVANT.

1. *Injury to employee—Onus probandi.*] The defendants were constructing a building in the city of Montreal, and at their solicitation, men (of whom the plaintiff was one) were sent by the City Corporation to introduce water from the street by a pipe connecting with the building. This could not be done without working inside as well as outside. A workman passing along the wall, above where the plaintiff was working at the pipe hole, loosened and started a brick in the wall, and the brick, falling down, injured the plaintiff. A hammer had fallen previously, and warning had been given to the men above. *Held*, that the burden of proof was on the defendants to rebut the presumption of negligence, and this not having been done, the defendants were liable. *Evans et al. & Monette*, 243.
2. *Responsibility of employer.*] M., the husband of plaintiff, was employed by the defendant, master of a steamship, to assist in unmooring the steamship then lying at the wharf at Montreal, and about to put to sea. While M. was standing ready to cast off the stern hawser from the post to which it was fastened, the hawser snapped, and M. was fatally injured. *Held*, the presumption was that the rope was insufficient for the purpose for which it was being used, or that the ship was unskilfully handled, and in either case, the master of the ship was responsible. *Corner & Byrd*, 262.

   Responsibility of employer.] A gang of men engaged by a railway company were proceeding on a construction train, to the place where they were about to be employed. Platform cars were provided by the company, but the men (of whom plaintiff was one), mounted upon a car laden with lumber, and the lumber giving way, the plaintiff and others were injured. *Held*, that it was the duty of the company's officials to have prevented the workmen from riding in such a dangerous position, or, at least, to have warned them very clearly of the peril, and the company were responsible for the damages suffered by the men. *Canadian Pacific Ry. Co. & Goyette*, 310.
3. *Injury caused by negligence of employee.*] An employer is responsible for the damages suffered by an employee through the ne-

MASTER AND SERVANT—*Continued.*
gligence or want of skill of a fellow employee. *Robinson & C. P. R. Co.*, 25.

MATRIMONIAL DOMICILE.
See DOMICILE, 113.

MONTREAL, CITY OF.
Warranty.] A vendor who sells a property during the proceedings of expropriation for a public improvement is not *garant* of the purchaser for the share of the cost of the improvement with which the property is charged by an assessment roll made subsequent to the date of the sale. *Cross & Windsor Hotel Co.*, 8.

MUNICIPAL CORPORATION.
Agreement to open street.] A municipal corporation cannot validly bind itself to make a by-law for the opening of a street, and no action will lie against such corporation for failure to carry out an agreement for the opening of a street. *Brunet & Corp. Côte St. Louis*, 103.

MUNICIPAL DEBENTURES.
Conditions.] A debenture is a negotiable instrument, and cannot bear a condition on its face, imposing an obligation in the future. And so, where a municipal corporation voted a bonus to a railway company payable in debentures, and the by-law imposed certain future obligations upon the company as to the mode of operating the road, it was held that debentures in which these obligations were set forth as conditions, were not a valid tender. *Macfarlane & Corp. of Parish of St. Césaire*, 160.

NEGLIGENCE.
Of employee.] *See* MASTER AND SERVANT, 25.
Of person driving hired horse.] *See* RESPONSIBILITY, 133.

PARISH.
Erection and Division of parishes.] Under the old law of France prior to the cession, the bishop had the right to create, unite or divide parishes in the interest of the church, having due regard to vested rights; and this condition of things has not been affected by the laws enacted for the province of Quebec since the cession of Canada. *Cadot & Ouimet*, 211.
See TITHE, 211.

PARTNERSHIP.
See PRINCIPAL AND AGENT, 353.

PHARMACY ACT, QUEBEC.
Construction of 48 *Vict. ch.* 36, *s.* 8.] The appellant, who had, during more than five years before the coming into force of the Act 48 Vic. ch. 36, practised as chemist and druggist in partner-

PHARMACY ACT, QUEBEC—*Continued.*

ship with his brother and in his brother's name, was entitled, under sect. 8 of the Act, to be registered as a licentiate of pharmacy. Sect. 8 must be construed as applying to those who have *illegally* practised as chemists and druggists, and it was immaterial whether the appellant had practised in his own name or in a partnership contrary to law, the illegality in either case being covered by the Act. *Brunet & L'Association Pharmaceutique*, 362.

PLEDGE.

Without delivery of possession.] *See* SALE, 332.

PRESCRIPTION.

1. *Action to annul sale by minor.*] *See* TUTOR AND MINOR, 228.
2. *Interruption of—Foreign judgment.*] A judgment obtained in a foreign country upon a promissory note made therein has the effect of interrupting prescription. *Almour & Harris*, 439.

PRINCIPAL AND AGENT.

1. *Acquiescence and Ratification.*] A principal may, by ratification of his agent's act, or even by tacit acquiescence, make himself responsible to a third party for an act of his agent in excess of his authority. *Banque d'Epargnes & Banque Jacques-Cartier*, 64.
2. *Authority of Agent.*] The purchaser of a car load of barley paid the price thereof to the vendor's agent from whom he received the grain, and who moreover was named in the bill of lading as the consignee. *Held*, that the bill of lading constituted a written authority to the consignee to control the consignment, and having delivered it, to receive the price; and his receipt was a valid discharge to the purchaser. *Lambert & Scott*, 340.
3. *Broker not disclosing principal.*] *See* GAMING CONTRACT, 170.
4. *Responsibility for acts of person managing business.*] The appellants set up a firm of "J. H. Wilkins & Co," which by private agreement was their own business, with J. H. Wilkins as manager, but to the public, the business was that of J. H. Wilkins & Co This firm bought goods from respondent, the price of which was claimed by the present action. *Held*, that the appellants were liable for the obligations of the firm of J. H. Wilkins & Co., and for the acts of J. H. Wilkins who was entrusted with the management. *Lewis et al. & Osborn*, 353.

PRIVILEGES AND HYPOTHECS.

Privilege of commercial traveller.] The privilege of a commercial traveller for wages, under C. C. 2006, which was maintained by the Court below (M. L. R., 1 S. C. 191) not determined by the Court of Appeal, but doubted. *Heyneman & Harris*, 466.

PROBABLE CAUSE.

See ILLEGAL ARREST, 365.

PROCEDURE.

1. *Allegation of new facts in replication to answer.*] A plaintiff, who

PROCEDURE—*Continued.*

has contested an opposition, may, by special replication to opposant's answer to contestation, allege a judgment in another cause between opposant and plaintiff's debtor, which decides the litigation between opposant and contestant, where such judgment has been rendered since the filing of the contestation, more especially if in the contestation and answer reference was made to the other cause, and the opposant did not complain in the Court below of the irregularity of the replication. *Bouchard & Lajoie*, 450.

2. *Appeal—Order of Judge in Chambers.* An appeal does not lie directly to the Court of Queen's Bench sitting in appeal from the decision of a judge in Chambers revising an order of the prothonotary in a matter coming within the provisions contained in the third part of the Code of Procedure. *Ross & Ross*, 1.
3. *Appeal to Supreme Court—Future Rights—Servitude.*] A question of servitude is one involving future rights within the meaning of Sect. 8 of the Supreme Court Amendment Act of 1879. *Wheeler & Black*, 159.
4. *Appointment of a single expert.*] Where the Court appointed one expert only, and the expert proceeded to act without protest or objection by the parties, they will be presumed to have acquiesced, and the expert's report will not be set aside on the ground urged subsequently that the Court should have appointed three experts. *Malbœuf & Larendeau*, 56.
5. *Declaration of Tiers Saisi—Contestation.*] Where the garnishee has declared that he owes the defendant nothing, but in answer to questions put by the judgment creditor, under C.C.P. 619, has made admissions which apparently show that he has a sum in his hands belonging to the defendant, the proper course is to contest the declaration, and not to inscribe for judgment *ex parte* on such statements. *Grant & Federal Bank of Canada*, 4.
6. *Execution—Sale beyond amount necessary to pay judgment debt.* *See* SHERIFF'S SALE, 303.
7. *Inscription for enquête.*] An inscription upon the roll *des enquêtes* for enquête, without the consent of the opposite party, is regular. *Exchange Bank & Craig*, M.L.R., 1 Q.B. 39, distinguished. *Normor & Farquhar*, 110.
8. *Irregularities in Court below.*] In an action on a promissory note for value received, the Court of Appeal will not be disposed, unless for some substantial reason, to send the case back to *enquête*. And so where the defendant was in default to proceed, and finally, after the case had been taken *en délibéré*, wished to examine some witnesses, and the Court below rejected the application, the Court of Appeal refused to send the case back, on the ground that the defendant had not shown any substantial grievance. *McGreevy & Senécal*, 471.
9. *Security for costs.*] 1. A motion for security for costs may be presented after the expiration of four days from the return of the

PROCEDURE—*Continued.*

writ, if notice of the motion has been given within the four days. *Connecticut & Passumpsic Rivers RR. Co.* v. *South Eastern RR.* Co., 105.

2. A non-resident defendant is entitled to security for costs from a non-resident plaintiff. *Ib.*, 105.

3. Where a non-resident defendant has been summoned by advertisement under C.C.P. 68, the four days run from the expiration of the two months within which he is ordered to appear, and if such delay expires within vacation, the delay runs from Sept. 1. *Ib.* 105.

4. Where a defendant, after giving notice of motion for security for costs, pleads without reserve of his right, he waives his right to security. *Ib.* 105.

10. *Security—Appeal to Supreme Court.*] On an appeal to the Supreme Court of Canada, personal security is sufficient. *Wheeler & Black*, 159.

See CAPIAS; JUDICIAL SALE OF MOVEABLES, 446; JURY TRIAL, 25; RAILWAY, 491; SHERIFF'S SALE, 298.

PROHIBITION, WRIT OF.

Defect of Jurisdiction.] A writ of prohibition lies to bring up before the Superior Court a defect of jurisdiction of justices of the Peace, which is only apparent on proof being made of the allegations of the plea containing matter showing such want of jurisdiction, *e.g.*, that the party prosecuted is the mere agent of a person not open to prosecution. *Molson & Lambe*, 381.

PROMISSORY NOTE.

Interruption of Prescription.] *See* PRESCRIPTION, 439.

PROPRIETORS *PAR INDIVIS.*

Ejectment by proprietor of undivided half.] *See* LESSOR AND LESSEE, 379.

QUO WARRANTO.

Proceedings under C.C.P. 1016. *See* USURPATION OF CORPORATE OFFICE, 374.

RAILWAY.

Execution—Seizure of part.] A portion of a railway cannot be seized and sold, except in accordance with the dispositions of the special statute authorizing the creation of the hypothec. *Stephen & La Banque d'Hochelaga*, 491.

RAILWAY COMPANY.

Passenger jumping from Train in motion.] Even where a railway company is in fault for not stopping its train at a station to which it contracted to carry a passenger, nevertheless the company is

RAILWAY COMPANY—*Continued.*

not responsible for injuries received by the passenger in jumping from the train while in motion, such damages being the result solely of the passenger's imprudence. *Central Vermont RR. and Lareau*, 258.

REGISTRATION.

Renewal of—Real Right.] The renewal of registration of any real right, required by C.C. 2172, has no reference to a right in the property itself, such as a servitude of drain through a property, established by deed in favor of a neighbouring property. *Wheeler & Black*, 139.

RÉMÉRÉ.

See SALE À RÉMÉRÉ, 450.

RESPONSIBILITY.

Injury to Passenger.] *See* CARRIER, 208.

Of owner of horse.] A hotel-keeper, from whom a guest hires a horse and vehicle for the purpose of taking a drive, is not responsible for the negligence of his guest while driving the animal. *Béliveau & Martineau*, 133.

See MASTER AND SERVANT; RAILWAY COMPANY.

REVENDICATION.

Moveables sold at Judicial Sale.] *See* JUDICIAL SALE, 446.

SAISIE-ARRÊT.

Against goods of trader who has made voluntary assignment.] *See* INSOLVENT TRADER, 466.

Contestation of declaration of garnishee.] *See* PROCEDURE, 4.

SALE.

1. *A réméré.*] A creditor may exercise the right of redemption in the place of his debtor, and if a judgment is rendered between the debtor and purchaser fixing the amount payable to the purchaser in order to obtain the retrocession, the creditor may have the advantage of such judgment. And if the immoveable has been *délaissé* by the purchaser and sold by the Sheriff, and the purchaser has been collocated for the sums paid by him, the creditor of the vendor may have the collocation reduced to the amount fixed by the judgment granting the *réméré*. If the moneys in Court are sufficient to satisfy the purchaser's claims, the creditor is not bound to tender him the amount which the vendor was bound to pay him in order to obtain the retrocession of the immoveable. *Bouchard & Lajoie*, 450.
2. *Delay in delivery—Diligence.*] The appellants, of Chatham, Ont., through brokers at Montreal, on the 6th of July, sold a cargo of wheat, to be shipped by sail, as soon as the vessel could be secured, and to be delivered at Montreal. The wheat did not arrive at Montreal until August 15, when the respondents refused

SALE—*Continued.*

to accept. The appellants had endeavored to obtain a vessel at Detroit, but it was not until July 21st that a vessel was finally chartered at Toronto. *Held*, that the delay which elapsed before a vessel was chartered, was an unreasonable delay, as it appeared that a vessel might have been obtained sooner at Toronto, if the appellants had been willing to pay a liberal rate of freight; and the appellants not having shown due diligence, the respondent was justified in refusing to accept the wheat. *Northwood & Borrowman*, 285.

3. *Refusal of purchaser to accept.*] The appellant, at Montreal, on the 26th of September, 1884, sold tea to arrive, ex "Glenorchy," at the port of New York. The tea reached Montreal October 14, 1884, and was then offered to respondents. The latter refused to accept unless the conditions of sale were altered, and the tea was re-sold at a loss. *Held*, that the offer of October 14 was an offer to deliver within a reasonable time, and that if the respondents, after refusing to take delivery according to the conditions of sale, wished to retract their refusal, it was incumbent on them to make a distinct offer to the appellant to do so, and not to leave him in doubt as to the position they took in the matter. *Cox & Turner*, 278.

4. *Without delivery of possession.*] B., who was the principal proprietor of a railway company, was in the habit of mingling the moneys of the company with his own. He bought locomotives essential to the business of the railway company, and for several years allowed the company to have possession of the locomotives openly and publicly as though their own property. *Held*, 1. That the locomotives must be presumed to be the property of the company—especially as regards creditors who had trusted the company on the faith of their possession of such property. 2. That the appellants, who claimed the locomotives under a sale from B. not accompanied by delivery, were not entitled to the property as against a *bona fide* creditor of the company. *Fairbanks et al. & The South Eastern Railway Co. & O'Halloran*, 332.

See JUDICIAL SALE OF MOVEABLES, 446.

SECURITY FOR COSTS.

See PROCEDURE, 105.

SERVITUDE.

1. *Action to enforce.*] The action to enforce a servitude of drain does not lie against a person who has ceased to be owner of the servient land before the action is instituted; but he may be condemned personally in damages if he participated in the act of obstruction. *Wheeler & Black*, 139.

2. *Interference with.*] The proprietor of the servient land can do nothing which tends to render the exercise of the servitude less convenient than it was at the date of its creation; and so, where the owner of the servient land had constructed a barn over the drain running through his land, and, in the opinion of the majo-

SERVITUDE—*Continued.*

rity of the Court, it was proved that repairs to the drain were necessary, it was held that the person to whom the servitude was due was entitled to ask that the barn be demolished to a sufficient extent to permit repairs to the drain to be made whenever necessary. *Wheeler & Black*, 139.

SHERIFF'S SALE.

1. *Sale of railway shares en bloc.*] Where a number of shares of railway stock were seized and advertised to be sold, in one lot, and neither the defendant nor any one interested in the sale requested the Sheriff to sell the shares separately, and it did not appear that there was any intention to defraud, or that any loss had been sustained in consequence of the shares being sold in one lot, but, on the contrary, that such mode of sale was advantageous to the creditors, a petition *en nullité de décret* made by creditors subsequently was rejected, although the amount realized by the sale *en bloc* was far in excess of the judgment debt for which the property was taken in execution. *Morris & Connecticut & Passumpsic Rivers RR. Co.*, 303.
2. *Usufruct.*] A sheriff having seized on one defendant the usufruct of an immoveable, and on the other defendants the *nue propriété*, and advertised the sale in the form quoted in the report: *held*, that under the advertisement, the sheriff was bound to sell the property as a whole,—*i.e.*, usufruct and *nue propriété* combined; and that a sale of these rights separately made by the sheriff having resulted in surprise and prejudice to the defendants, it would be set aside, on petition *en nullité de décret* by defendants. Usufruct is incorporeal right which, under C.P.C. 638, should have been set forth in the *procès-verbal* of seizure and also by advertisement by mention of the title under which it is due. *Cheney & Brunet*, 298.

SHIPPING.

1. *Charter party—Deviation.*] The charter party described the voyage in writing as being from Havana, Cuba, "to Montreal direct *via* the river St. Lawrence." A printed clause declared that the steamship should "have liberty to tow and be towed, and to assist vessels in all situations, *also to call at any port or ports for coals or other supplies.*" *Held*, that the fact that the steamship called at the port of Sydney, C.B., for coal in the course of the voyage, was not a deviation therefrom other than permitted by the charter party, and that the increased premium of insurance paid by the charterers in consequence of the vessel calling at Sydney could not be deducted from the freight. *Peters & Canada Sugar Refining Co.*, 420.
2. *Charter party—Time—Rejection of contract.*] The appellant, in January 1879, agreed to charter a steamship, for the carriage of live cattle to England, and the conditions of the charter party were that the ship should proceed to Montreal with all convenient speed, to arrive there "between" (or about) the opening

SHIPPING—*Continued.*

of navigation of 1879, and thereafter to run regularly between New York and London, and to be dispatched from Montreal in regular rotation with other steamers under charter of the same charterer, to be chartered up to 1st October, 1879. Navigation opened at Montreal about 1st May, but the steamship did not arrive there until 18th May, when the appellant refused to load. *Held* (following *McShane & Henderson*, M.L.R., 1 Q.B. 264), that there was not a substantial compliance with the contract on the part of the ship, and the appellant was entitled to throw up the charter party. *McShane & Hall*, 42.

STOCK TRANSACTIONS.

See GAMING CONTRACT, 170.

SUBSTITUTIO

1. *Degrees of.*] Degrees of substitution are counted by heads (*par têtes*), and not by roots (*par souches*). When the share of one among several who took conjointly passes to the others by his death, such transmission is reckoned an additional degree as regards the share so transmitted. *Jones & Cuthbert*, 44.
2. *Limits of.*] By the old jurisprudence introduced into the province of Quebec, and which was not affected in this particular by the Imperial Statute of 1774, a substitution created by will was limited to two degrees exclusive of the institute. *Jones & Cuthbert*, 44.
3. *Terms creating.*] A testator having bequeathed his estate as follows:—"I leave all my personal and real estate for the benefit "of my wife and family during her life if she remains unmar- "ried to receive and apply such funds as may be accruing out "of it for the support and maintenance of the family and educa- "ting them if she again marry her dower is all that she will "have out of the estate the rest to be equally divided among "the children." *Held*, that this created a substitution of which the widow was institute and the children substitutes, and was not a case of usufruct to the widow and *nue propriété* to the children. And though both widow and children had for years acted on the latter interpretation, they were not thereby deprived of the right to urge the other interpretation. *Macdonnell & Ross*, 249.
4. *Title of grevé.*] *See* INSURANCE, FIRE, 89.

TENANT.

See LESSOR AND LESSEE.

TITHE.

Erection and division of parishes.] When a portion of a canonical parish civilly constituted is detached by decree of the bishop and annexed to a canonical parish not civilly constituted, the tithe is due by an inhabitant of the dismembered parish to the new *curé*. *Cadot & Ouimet*, 211.

TUTOR AND MINOR.

Deed equivalent to rendering of account.] A deed of sale by a minor, emancipated by marriage, to her father and ex-tutor (without any account being rendered, but after the making of an inventory of the community existing between her father and mother), of her share in her mother's succession,—said deed containing a valuation of what was coming to her from her tutor—should be considered as equivalent to an account accepted and discharge granted, and therefore, under C.C. 2258, which is applicable to such cases, the action of the pupil to annul the sale is prescribed by ten years from majority. *Grégoire & Grégoire*, 228.

USUFRUCT.

Sale of.] *See* SHERIFF'S SALE, 298.

USURPATION OF CORPORATE OFFICE.

Proceedings under C.C.P. 1016.] The proceedings authorized by Art. 1016 C.C.P., and subsequent articles of the same section, apply to cases of usurpation of an office in any corporation whatever, without any distinction. *Gilmour & Hall*, 374; *Heffernan & Walsh*, 482.

VENDOR AND PURCHASER.

See SALE.

WARRANTY.

See MONTREAL, CITY OF, 8.

WILL.

Revocation of legacy.] H., who had $5000 of stock in La Banque du Peuple, made a will by which he bequeathed $1000 of this stock to his grand-daughter. Subsequently, he made three separate codicils, all bearing the same date, by one of which he bequeathed $3000 of the said stock to the same grand-daughter, and by the other two codicils he made specific bequests of $1000 each of said stock for other objects,—thus disposing by the codicils of the entire sum of $5000. The question was whether the bequest by the first codicil of $3000 to the grand-daughter, under the circumstances stated, revoked the previous bequest in her favor, of $1000, contained in the will. *Held*, that the legacies contained in the codicils, disposing as they did, specifically, of all the stock which the testator had in La Banque du Peuple, operated a revocation of the first bequest of $1000 to the grand daughter, contained in the will. *Pattison & Fuller*, 349.

Substitution or usufruct.] *See* SUBSTITUTION, 249.

WITNESS.

Absence of, at jury trial.] *See* JURY TRIAL, 25.

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